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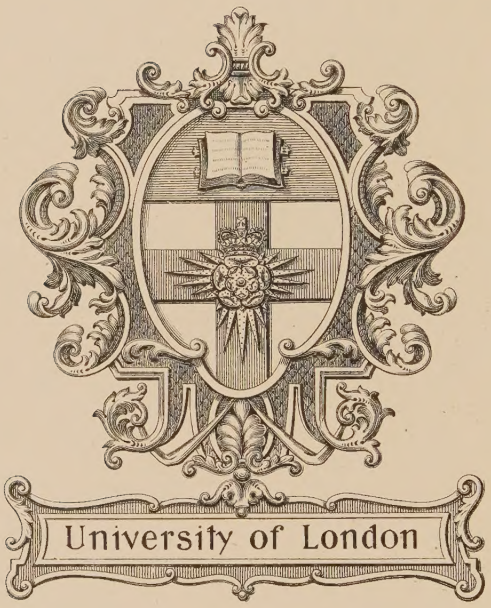

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INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

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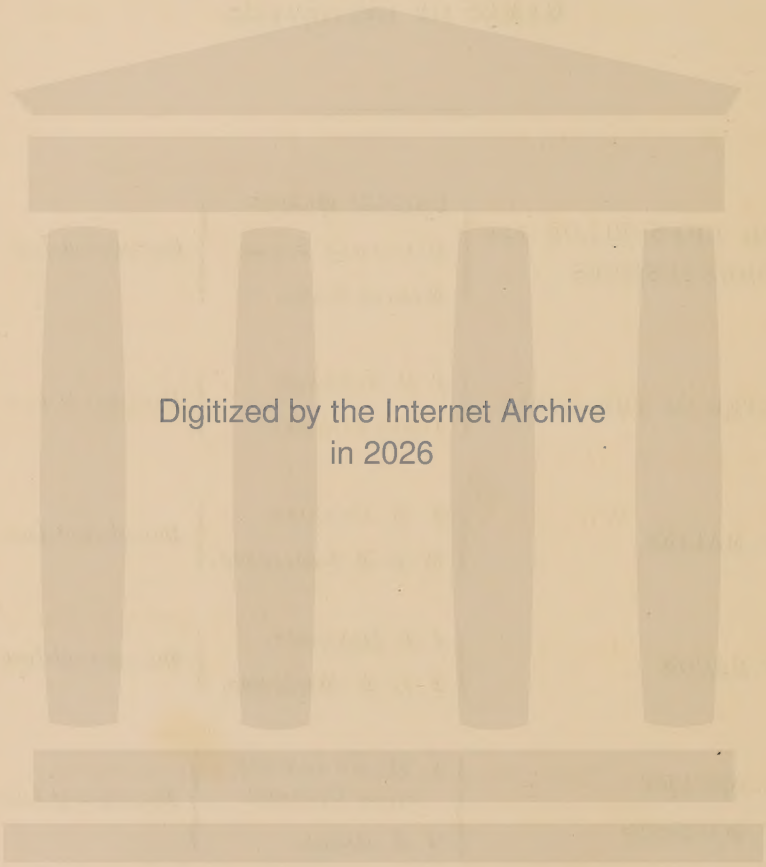

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ADDENDUM AND ERRATA.

[The sign – prefixed to the number indicating the line, signifies that it is reckoned from the bottom of the page.]

Page	*Line*	*For*	*Read*
213	at foot	*add,* Affirmed on appeal, 10 June, 1871.	
396	foot note (1)	14 Beav. 1	14 Beav. 9.
413	– 4	Turner	Fischer.
477	12	Sylvester Hunter	H. J. Hunter.
530	foot note (1)	1 Ves. Sen. 464.	1 Ves. 464.
582	foot note (1)	2 K. & J. 513.	2 K. & J. 313.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PAGE

A.

Agra and Masterman's Bank, *In re* – – – – 509, n.
Armstrong *v.* Armstrong – – 614
Attorney-General *v.* Clements – 32
——————— *v.* Corporation of Halifax – – – – 262
——————— *v.* Read – 38

B.

Bain *v.* Sadler – – – 570
Banner, Merchants' Trading Company *v.* – – – 18
Barrett, Rhodes *v.* *Ex parte* Singleton – – – – 479
Bartlett *v.* Rees – – – 395
Beaumont's Mortgage Trusts, *In re* 86
Bellasis' Trust, *In re* – – 218
Berchtoldt, Chatfield *v.* – – 464
Betton's Trust Estates, *In re* – 553
Blackburn, *Ex parte.* *In re* Cheesebrough – – – 358
——————— *v.* Dickson. *In re* Dickson – – – – 154
Bonelli's Telegraph Company, *In re.* Collie's Claim – – 246
Boone, Kidd *v.* – – – 89
Broadbent, *In re.* *Ex parte* Homan – – – – 598
Brookes, Coombes *v.* – – 61
Browne, *In re.* *Ex parte* Hughes 137
——————— *v.* Collins – – – 586
Brunel *v.* Brunel – – – 298
Burkinshaw *v.* Wilson – – 103

C.

Cameron, Frith *v.* – – – 169
Carr's Trusts, *In re* – – 609
Carter, Wyman *v.* – – – 309
Charity Schools of St. Dunstan-in-the-West, *In re* – – 537
Chatfield *v.* Berchtoldt – – 464
Cheesebrough, *In re.* *Ex parte* Blackburn – – – – 358
Cherry, *In re.* *Ex parte* Mathews 596
Chester *v.* Chester – – – 444
Children, Paul *v.* – – – 16
Clements, Attorney-General *v.* – 32
Cocks *v.* Manners – – – 574
Collie's Claim. *In re* Bonelli's Telegraph Company – – 246
Collins, Browne *v.* – – – 586
——————— *v.* Collins – – – 455
———————, Turner *v.* – – – 438
Contract Corporation, *In re.* Hudson's Case – – – – 1
Cook *v.* Hart – – – – 459
Cook's Settled Estates, *In re* – 12
Coombes *v.* Brookes – – 61

PAGE

Cottrell, Joyce *v.* *In re* Cottrell's Estate – – – – 566
Cottrell's Estate, *In re.* Joyce *v.* Cottrell – – – – 566
Cousens *v.* Rose – – – 366
Crabtree *v.* Poole – – – 13
Crossley *v.* Elworthy – – 158

D.

Darling, Mackie *v.* – – – 319
Davis' Case. *In re* Durham County Permanent Investment, Land, and Building Society – 516
——— Trusts, *In re* – – – 214
Dawes, De Rochefort *v.* – – 540
Dean *v.* Sharp – – – 198
Denton, Wedgwood *v.* – – 290
De Rochefort *v.* Dawes – – 540
Desborough, Lumley *v.* *In re* Keane – – – – 115
Dickinson, Pike *v.* – – – 64
Dickson, Blackburn *v.* *In re* Dickson – – – – 154
———, *In re.* Blackburn *v.* Dickson – – – – 154
Douglas *v.* Douglas – – 617
——— *v.* Webster – – 617
Durham County Permanent Investment, Land, and Building Society, *In re.* Davis' Case – 516
——————— Wilson's Case 516

E.

Edmondson *v.* Sharp – – 198
Edwards, *Ex parte.* *In re* Marylebone (Stingo Lane) Improvement Act – – – – 389
Elkan, Upmann *v.* – – – 140
Elworthy, Crossley *v.* – – 158
Engelback, Rees *v.* – – – 225
England, *In re.* *Ex parte* Sheriff of Middlesex – – – 207

F.

Farhall *v.* Farhall – – – 98
Finch *v.* Westrope – – – 24
Frith *v.* Cameron – – – 169
Fynney, Piercy *v.* – – – 69

PAGE

G.

Gimblett *v.* Purton – – – 427
Gregory, Wildbore *v.* – – 482

H.

Halifax, Corporation of, Attorney-General *v.* – – 262
Halliday's Settled Estates, *In re* 199
Harbin *v.* Masterman – – 559
Hardy *v.* Metropolitan Land and Finance Company – – 386
Hart, Cook *v.* – – – – 459
Harvey, Pratt *v.* – – – 544
Haygarth *v.* Wearing – – 320
Herbert, Sinnett *v.* – – – 201
Highgate Archway Company *v.* Jeakes – – – – 9
Hill's Trusts, *In re* – – – 302
Holmesdale (Viscount) *v.* West 280
Homan, *Ex parte.* *In re* Broadbent – – – – – 598
Home Assurance Association, *In re* – – – – – 59
——————— (No. 2), *In re* – – – – 112
Hotham's (Lord) Trusts, *In re* 76
Hudson's Case. *In re* Contract Corporation – – – 1
Hughes, *Ex parte.* *In re* Browne 137

I.

Imperial Mercantile Credit Association, *In re* – – – 504

J.

Jackson, *In re.* *Ex parte* Union Bank of Manchester – – 354
Jeakes, Highgate Archway Company *v.* – – – – 9
Joyce *v.* Cottrell. *In re* Cottrell's Estate – – – – 566

K.

Keane, *In re.* Lumley *v.* Desborough – – – – 115
Kerrison's Trusts, *In re* – – 422

PAGE

Kidd *v.* Boone – – – 89
Kilvert's Trusts, *In re* – – 183
Knapp *v.* Knapp – – – 238

L.

Laing, Pears *v.* – – – 41
Langley Mill Steel and Iron Works Company, *In re* – – 26
Larsen, Peek *v.* – – – 378
Laugharne Railway Company, *In re* – – – – – 454
London and Devon Biscuit Company, *In re* – – – – 190
London and Mediterranean Bank, *In re.* Wright's Case – 331
London Bank of Scotland, *Ex parte. In re* Mercantile and Exchange Bank – – – 268
Lumley *v.* Desborough. *In re* Keane – – – – 115

M.

Mackie *v.* Darling – – – 319
Magrath *v.* Morehead – – 491
Manners, Cocks *v.* – – – 574
Marylebone (Stingo Lane) Improvement Act, *In re. Ex parte* Edwards – – – 389
Mason's Trusts, *In re. Ex parte* Smithett – – – – 111
Masterman, Harbin *v.* – – 559
Mathews, *Ex parte. In re* Cherry 596
Mercantile and Exchange Bank, *In re. Ex parte* London Bank of Scotland – – – – 268
Merchants' Trading Company *v.* Banner – – – – 18
Metropolitan Land and Finance Company, Hardy *v.* – – 386
Morehead, Magrath *v.* – – 491
Morris, *Ex parte* – – – 418

N.

Newill *v.* Newill – – – 432

O.

Oriental Commercial Bank, *In re* 501
O'Leary, Wilson *v.* – – – 525

PAGE

Oriental Hotels Company, *In re.* Perry *v.* Oriental Hotels Company – – – – – 126
Osborn's Mortgage Trusts, *In re* 392
Owen's Trusts, *In re* – – 316

P.

Paul *v.* Children – – – 16
Pears *v.* Laing – – – 41
Peek *v.* Larsen – – – 378
Perry *v.* Oriental Hotels Company. *In re* Oriental Hotels Company – – – – 126
Piercy *v.* Fynney – – – 69
Pike *v.* Dickinson – – – 64
Pitt, Wright *v.* – – – 408
Pointon *v.* Pointon – – – 547
Poole, Crabtree *v.* – – – 13
Pott, Williams *v.* – – – 149
Powell *v.* Riley – – – 175
Pratt *v.* Harvey – – – 544
Purton, Gimblett *v.* – – 427

R.

Radford *v.* Willis – – – 105
Radley and Bramall, *In re. In re* Sankey Brook Coal Company 472
Read, Attorney-General *v.* – 38
Rees, Bartlett *v.* – – – 395
—— *v.* Engelback – – – 225
Rhodes *v.* Barret. *Ex parte* Singleton – – – – 479
Richardson, *In re* – – – 398
Riley, Powell *v.* – – – 175
Rose, Cousens *v.* – – – 366
Russell Road Purchase-Moneys, *In re* – – – – – 78

S.

Sadler, Bain *v.* – – – 570
Sanderson's Patents Association, *In re* – – – – 188
Sankey Brook Coal Company, *In re. In re* Radley and Bramall 472
Seligmann, Walker *v.* – – 152
Sharp, Dean *v.* – – – 198
——, Edmondson *v.* – – 198

PAGE

Shaw's Trusts, *In re* – – 124
Sheriff of Middlesex, *Ex parte.* *In re* England – – – 207
Singleton, *Ex parte.* Rhodes *v.* Barret – – – – 479
Sinnett *v.* Herbert – – – 201
Smithett, *Ex parte.* *In re* Mason's Trusts – – – – 111
Surtees *v.* Surtees – – – 400
Sutton *v.* Wilders – – – 373

T.

Thakeham Sequestration Moneys, *In re* – – – – – 494
Turner *v.* Collins – – – 438

U.

Union Bank of Manchester, *Ex parte.* *In re* Jackson – – 354
Upmann *v.* Elkan – – – 140

PAGE

W.

Walker *v.* Seligmann – – 152
Wearing, Haygarth *v.* – – 320
Webster, Douglas *v.* – – 617
Wedgwood *v.* Denton – – 290
West, Viscount Holmesdale *v.* – 280
Westrope, Finch *v.* – – – 24
Wildbore *v.* Gregory – – 482
Wilders, Sutton *v.* – – – 373
Wilkinson *v.* Wilkinson – – 604
Williams' Estate, *In re* – – 488
Williams *v.* Pott – – – 149
Willis, Radford *v.* – – – 105
Wilson, Burkinshaw *v.* – – 103
——— *v.* O'Leary – – – 525
Wilson's Case. *In re* Durham County Permanent Investment, Land, and Building Society – – – – – 516
Wright *v.* Pitt – – – 408
Wright's Case. *In re* London and Mediterranean Bank – 331
Wyman *v.* Carter – – – 309

TABLE OF CASES CITED.

A.

		PAGE
Agar *v.* Athenæum Life Assurance Society	3 C. B. (N.S.) 725	253
Agra and Masterman's Bank	Law Rep. 12 Eq. 509, n.	509
Aikman *v.* Aikman	3 Macq. 854	625
Ainsworth *v.* Walmesley	Law Rep. 1 Eq. 518	143
Aitchison *v.* Dixon	Law Rep. 10 Eq. 589	612
Aldred *v.* Constable	4 Q. B. 674	362
Aldrich *v.* Cooper	8 Ves. 382	542
Alexander *v.* Alexander	Tud. L. C. 2nd Ed. 330	243
Allen *v.* Callow	3 Ves. 289	528
Allen's Estate, In re	3 Drew. 380	304
Anderson, Ex parte	Law Rep. 5 Ch. 473	21, 62
Andrews *v.* Partington	3 Bro. C. C. 401	428
Anglo-Romano Water Company, In re	Law Rep. 5 Ch. 437	509
Armstrong *v.* Armstrong	Law Rep. 7 Eq. 518	318, 434
——— *v.* Storer	14 Beav. 535	131
Arnott *v.* Groom	9 Court of Sess. Cas. (2nd Series) 142	626
Ashby *v.* Ashby	7 B. & C. 444	100
Ashley's Case	Law Rep. 9 Eq. 263	348
Ashton *v.* Blackshaw	Law Rep. 9 Eq. 510	602
Atkins *v.* Cooke	3 Drew. 694; 3 Jur. (N.S.) 283	113
Atkinson *v.* Holtby	10 H. L. C. 313	403
Atkinson's Trusts, In re	2 D. M. & G. 140	356
Attorney-General *v.* Compton	1 Y. & C. Ch. 417	439
——— *v.* Countess de Wahlstatt	3 H. & C. 374	631
——— *v.* Haberdashers' Company	1 My. & K. 420	581
——— *v.* Harley	4 Madd. 263	530
——— *v.* Hull	9 Hare, 647	203
——— *v.* Lucas	2 Ph. 753	35, 40
——— *v.* Napier	6 Ex. 217	626
——— *v.* Rowe	1 H. & C. 31	634
——— *v.* Whorwood	1 Ves. Sen. 534	583
Atwood *v.* Hawkins	Finch, 113	234
Audsley *v.* Horn	26 Beav. 195; 1 D. F. & J. 226	318, 433, 434

B.

Bailey *v.* Birchall	2 H. & M. 371	120
Baker *v.* Sutton	1 Keen, 224	579
Bargate *v.* Shortridge	5 H. L. C. 297	253

		PAGE
Barker *v.* Cocks	6 Beav. 82	305
Barling *v.* Bishopp	29 Beav. 417	162
Barned's Banking Company, In re	Law Rep. 3 Ch. 105	253
Barnes *v.* Racster	1 Y. & C. Ch. 401	462, 542
Barnewell *v.* Iremonger	9 W. R. 88	544
Barr's Trusts, In re	4 K. & J. 219	356
Bartlett *v.* Harton	17 Beav. 479	104
Barton's Trusts, In re	Law Rep. 5 Eq. 238	592
Bastow & Co., In re	Law Rep. 4 Eq. 681	191
Bateman *v.* Gray	Law Rep. 6 Eq. 215	429
Bates *v.* Mackinley	31 Beav. 280	591
Beaumont *v.* Oliveira	Law Rep. 4 Ch. 309	580
Beckley *v.* Dorrington	Cited in Alsager *v.* Rowley, 6 Ves. 748	232
Belchier *v.* Renforth	5 Bro. P. C. 292	80
Bell *v.* Bird	Law Rep. 6 Eq. 635	63
—— *v.* Kennedy	Law Rep. 1 H. L., Sc. 307	301, 626
Bempde *v.* Johnstone	3 Ves. 198	630
Bennett *v.* Hayter	2 Beav. 81	185
Bernasconi *v.* Atkinson	10 Hare, 345	185
Berrie *v.* Howitt	Law Rep. 9 Eq. 1	119
Berrington *v.* Evans	3 Y. & C. Ex. 384	477
Berry *v.* Hebblethwaite	4 K. & J. 80	133
Bibby *v.* Thompson	32 Beav. 647	433
Billage *v.* Southee	9 Hare, 534	322
Birks *v.* Micklethwait	34 L. J. (Ch.) 362	376
Birmingham Blue Coat School, In re	Law Rep. 1 Eq. 632	12
Birmingham Gaslight and Coke Company, Ex parte	Law Rep. 11 Eq. 204	596
Birtwhistle *v.* Vardill	7 Cl. & F. 895	627
Bissell, In re	Law Rep. 11 Eq. 604	209
Blackett *v.* Bates	Law Rep. 1 Ch. 117	21
Blaikie *v.* Stembridge	6 C. B. (N.S.) 894	382
Blair *v.* Bromley	5 Hare, 542	162
Blanchard, In re	3 D. F. & J. 131	61
Bliss *v.* Smith	34 Beav. 508	22
Blundell *v.* Gladstone	11 Sim. 467	185
Bolton, Ex parte	1 De G. & J. 163	355
Bonbonus, Ex parte	8 Ves. 540	72
Bonsor *v.* Bradshaw	7 Jur. (N.S.) 231; 10 W. R. 481	119
Boreham *v.* Bignall	8 Hare, 131	109
Bostock *v.* Floyer	Law Rep. 1 Eq. 26	376
Bowers *v.* Bowers	Law Rep. 5 Ch. 244	304
Bowes *v.* Hope Mutual Life Assurance Company	11 H. L. C. 389	28
Brashier *v.* Jackson	6 M. & W. 549	93
Braybroke (Lord) *v.* Inskip	8 Ves. 417	555
Brett *v.* East India and London Shipping Company	2 H. & M. 404	21
Bridger's and Neill's Cases	Law Rep. 4 Ch. 266	348
Brighton Hotel Company, In re	Law Rep. 6 Eq. 339	28
Brodie *v.* Barry	2 V. & B. 127	629
Brocke *v.* Lord Mostyn	2 D. J. & S. 373	174
Brown *v.* Peck	1 Eden 140	606
——— *v.* Smith	21 L. J. (Ch.) 356	626
——— *v.* Stoddard	10 Met. 375	502
Bruin *v.* Knott	1 Ph. 272	567

		PAGE
Brunton *v.* Hall	1 Q. B. 792	370
Bryan *v.* Collins	16 Beav. 14	562
Buck, Ex parte	1 H. & M. 519	419
Bullock *v.* Bennett	1 K. & J. 315; 7 D. M. & G. 283	294
Bulmer *v.* Hunter	Law Rep. 8 Eq. 46	162
Bunter *v.* Cresswell	14 Q. B. 825	497
Burdett *v.* Rockley	1 Vern. 58	138
Burgess *v.* Hills	26 Beav. 244	144
Bustard *v.* Saunders	7 Beav. 92	433
Bute (Marquis of) *v.* Cunynghame	2 Russ. 275	543
Butricke *v.* Broadhurst	3 Bro. C. C. 88; 1 Ves. 171	629

C.

Campbell *v.* Earl Radnor	1 Bro. C. C. 271	530
——— *v.* Mackay	1 My. & Cr. 603	549
Campion *v.* Colvin	3 Bing. N. C. 17	382
Cannan's Claim	Law Rep. 7 Eq. 102	513
Capdevielle, In re	2 H. & C. 985	625
Carlton *v.* Thompson	Law Rep. 1 H. L., Sc. 232	109
Carne *v.* Long	2 D. F. & J. 75	580
Carpmael *v.* Powis	10 Beav. 36	322
Carter *v.* Great Eastern Railway Company	8 L. T. (N.S.) 197	391
Castellan *v.* Hobson	Law Rep. 10 Eq. 47	413
Castle *v.* Fox	Law Rep. 11 Eq. 542	174, 294
Cawthorn *v.* Chalie	2 S. & S. 127	232
Chamley *v.* Lord Dunsany	2 Sch. & Lef. 174 App.	162
Chapman *v.* Turner	6 M. & W. 100	93
Cherry *v.* Mott	1 My. & Cr. 123	203
Cherry's Settled Estates, In re	31 L. J. (Ch.) 351	538
Childs *v.* Monins	2 Brod. & B. 460	101
Chinnery *v.* Evans	11 H. L. C. 115	50
Clark *v.* Taylor	1 Drew. 642	203
Clarke *v.* Price	2 Wils. C. C. 157	22
Clavering *v.* Ellison	3 Drew. 451	606
Clergy Society, In re	2 K. & J. 615	185
Clinton *v.* Hooper	1 Ves. 173	555
Clive *v.* Carew	1 J. & H. 199	121
—— *v.* Clive	Kay, 600	592
Clough *v.* French	2 Coll. 277	93
Cole and Attwater, Ex parte	3 D. J. & S. 380	597
Collins *v.* Burton	4 De G. & J. 612	597
Collier *v.* Squire	3 Russ. 467	457
Conybeare *v.* Farries	Law Rep. 5 Ex. 16	597
Cook *v.* Gregson	3 Drew. 547	572
Cooke *v.* Lamotte	15 Beav. 234	322
Coope *v.* Cresswell	Law Rep. 2 Ch. 112	49
Cooper *v.* Cooper	1 K. & J. 658	304
Coote *v.* Boyd	2 Bro. C. C. 521	530
—— *v.* Coote	3 J. & Lat. 175	177
Cork and Youghal Railway Company, In re	Law Rep. 4 Ch. 748	519
Corner *v.* Shew	3 M. & W. 350	101
County Life Assurance Company, In re	Law Rep. 5 Ch. 288	253

		PAGE
Courtney *v.* Taylor	7 Scott. N. R. 749	156
Cowling *v.* Higginson	4 M. & W. 245	370
Cox *v.* Bennett	Law Rep. 6 Eq. 422	294
—— *v.* Bishop	8 D. M. & G. 815	415
Cradock *v.* Cradock	4 Jur. (N.S.) 626	403
Cresswell *v.* Cresswell	Law Rep. 6 Eq. 69	528, 545
Creyke's Case	Law Rep. 5 Ch. 63	3, 348
Cripps *v.* Wolcott	4 Madd. 11	304
Crockett *v.* Crockett	2 Ph. 553	434
Crookenden *v.* Fuller	1 Swa. & Tr. 441	627
Cutfield *v.* Richards	26 Beav. 241	461

D.

Dacre *v.* Patrickson	1 Dr. & Sm. 182	450
Darby *v.* Darby	3 Drew. 495	355
D'Arcy *v.* Tamar Railway Company	Law Rep. 2 Ex. 158	253
Darley *v.* Langworthy	3 Bro. P. C. 359	294
Davies *v.* Williams	1 Sim. 5	232
Davenport *v.* Bishopp	2 Y. & C. Ch. 463	305
Dawson *v.* Bourne	16 Beav. 29	433
Dean *v.* Handley	2 H. & M. 635	304
Dearle *v.* Hall	3 Russ. 1	355
De Gendre *v.* Kent	Law Rep. 4 Eq. 283	592
Denny *v.* Hancock	Law Rep. 6 Ch. 138	596
Dent *v.* Dent	30 Beav. 363	173
De Tabley's (Lord) Settled Estates, In re	11 W. R. 936	200
Devaynes *v.* Robinson	24 Beav. 86	550
Dewhurst *v.* Clarkson	3 E. & B. 194	518
De Windt *v.* De Windt	Law Rep. 1 H. L. 87	403
De Witte *v.* De Witte	11 Sim. 41	433
Dighton *v.* Withers	31 Beav. 423	133
Dickenson *v.* Teasdale	1 D. J. & S. 52	49
Dillon *v.* Parker	1 Sw. 381, n.	629
Dodkin *v.* Brunt	Law Rep. 6 Eq. 580	216
Doe *v.* Aldridge	4 T. R. 264	581
—— *v.* Copestake	6 East, 328	581
—— *v.* Hawke	2 East. 481	607
—— *v.* Hicks	8 Bing. 475	530
—— *v.* Hiscocks	5 M. & W. 363	185
Donaldsen *v.* M'Clure	20 Court of Sess. Cas. (2nd Series) 307	625
Donaldson, In the Goods of	2 Curt. 386	627
Dowson *v.* Gascoign	2 Keen, 14	457
Drake *v.* Drake	8 H. L. C. 172	185
Drewett *v.* Pollard	27 Beav. 196	562
Driver *v.* Franks	3 M. & S. 25; 8 Taunt. 468	108
Duberly *v.* Day	14 Beav. 1	396
Dundas *v.* Dutens	1 Ves. 196	355
Dungey *v.* Angove	2 Ves. 304	439
Dummer's Will, In re	2 D. J. & S. 515	77
Dunn *v.* Bownas	1 K. & J. 596	203
Dunne *v.* Dunne	3 Sm. & Giff. 22	606

PAGE

E.

East India Company *v.* Coles . . 3 Sw. 142, n. . . . 233
Eastern Counties and London and Blackwall Railway Companies *v.* Marriage . 9 H. L. C. 32 . . . 419
Eddleston *v.* Collins . . . 3 D. M. & G. 1 . . 556
Edelsten *v.* Edelsten . . . 1 D. J. & S. 185 . . 144
Edenborough *v.* Archbishop of Canterbury . . . . . 2 Russ. 93 . . . 439
Edmunds *v.* Fessey . . . 29 Beav. 233 . . . 17
Edwards *v.* Edwards . . . 15 Beav. 357 . . . 304
——— *v.* Hall . . . 6 D. M. & G. 74; 11 Hare, 1 . 203
——— *v.* Martin . . . Law Rep. 1 Eq. 121 . . 355
——— *v.* ——— . . . 7 W. R. 30 . . . 396
Elliott *v.* Cordell . . . 5 Madd. 149 . . . 611
Ellis *v.* Maxwell . . . 3 Beav. 587; 12 Beav. 104 . 562
Elmore's Trusts, In re . . . 6 Jur. (N.S.) 1325 . . 125
Emery *v.* Mucklow . . . 10 Bing. 23 . . . 71
Emuss *v.* Smith . . . 2 De G. & Sm. 722 . . 294
Ernest *v.* Croysdill . . . 2 D. F. & J. 175 . . 388
Ernest *v.* Vivian . . . 33 L. J. (Ch.) 513 . . 413
Evans *v.* Astley . . . 3 Burr. 1570 . . . 402
——— *v.* Evans . . . 23 Beav. 1 . . . 487
——— *v.* Llewellyn . . . 2 Bro. C. C. 150; 1 Cox, 333 . 322

F.

Fagg *v.* James . . . 8 L. T. (N.S.) 5 . . 15
Ferguson *v.* Wilson . . . Law Rep. 2 Ch. 77 . . 274
Fillingham *v.* Bromley . . . T. & R. 530 . . 555, 606
Fleming *v.* Armstrong . . . 34 Beav. 109 . . . 120
Flower, Ex parte . . . Law Rep. 1 Ch. 599 . . 419
Forbes *v.* Forbes . . . Kay, 341 . . . 626
Ford *v.* Ford . . . 6 Hare, 486 . . . 561
Fordham *v.* Wallis . . . 10 Hare, 217 . . . 49
Forester *v.* Read . . . Law Rep. 6 Ch. 40 . . 439
Forsyth *v.* Bristowe . . . 8 Ex. 716 . . . 52
Foster *v.* Colby . . . 3 H. & N. 705; 28 L. J. (Ex.) 81 . . . 381
Fox's Case . . . Law Rep. 6 Ch. 176 . . 510
Franks *v.* Brooker . . . 27 Beav. 635 . . . 108
Fraser *v.* Byng . . . 1 Russ. & My. 90 . . 530
Freeman *v.* Edwards . . . 17 L. J. (Ex.) 258 . . 477
——— *v.* Fairlie . . . 11 Jur. 447 . . . 612
——— *v.* Pope . . . Law Rep. 5 Ch. 538 . . 162
Freemoult *v.* Dedire . . . 1 P. Wms. 429 . . 477
Freshney *v.* Carrick . . . 1 H. & N. 653 . . . 602
Frost *v.* Ward . . . 2 D. J. & S. 70 . . 480
Fry *v.* Chartered Bank of India . . Law Rep. 1 C. P. 689 . . 381
Fuller *v.* Morgan . . . Set. on D. p. 380 . . 462

G.

Gamstone *v.* Gaunt . . . 1 Coll. 577 . . . 173
Gath *v.* Burton . . . 1 Beav. 478 . . . 293
General Rolling Stock Company, Re . 34 Beav. 314 . . . 28
German Mining Company, In re . . 4 D. M. & G. 19 . . 519

		PAGE
Gibson *v.* Boutts	3 Scott, 229	362
Gilbertson *v.* Gilbertson	34 Beav. 354	177
Gillespie *v.* Alexander	2 S. & S. 145	530
Gillibrand *v.* Goold	5 Sim. 149	243
Gillman *v.* Daunt	3 K. & J. 48	428
Gladstone *v.* Birley	3 Mer. 401	382
Glendening *v.* Glendening	9 Beav. 424	457
Gordon *v.* Atkinson	1 De G. & Sm. 478	404
——— *v.* Ellis	2 C. B. 821	72
Gordon's Trusts, In re	Law Rep. 6 Eq. 335	112
Gosden *v.* Dotherill	1 My. & K. 56	457
Graham *v.* Jackson	6 Q. B. 811	121
——— *v.* Maxwell	1 Mac. & G. 71	153
Grant *v.* Grant	34 Beav. 623	323
Grantham Canal Company *v.* Ambergate, &c., Railway Company	21 L. J. (Q.B.) 322	369
Gray *v.* Lewis	Law Rep. 8 Eq. 526	388
Great Ship Company, In re	10 Jur. (N.S.) 3	191
Great Western Railway Company *v.* Rous	Law Rep. 4 H. L. 650	413
Greene *v.* Greene	4 Madd. 148	177
Gregson *v.* Hindley	10 Jur. 1135	51
Gregson's Trusts, In re	34 L. J. (Ch.) 41	305
Grenfell *v.* Girdlestone	2 Y. & C. Ex. 662	51
Grenville-Murray *v.* Earl of Clarendon	Law Rep. 9 Eq. 11	71
Grey *v.* Pearson	6 H. L. C. 61	402
Griffiths *v.* Vere	9 Ves. 127	561
Grimes *v.* Harrison	26 Beav. 435	519
Grosvenor *v.* Durston	25 Beav. 97	457
——— *v.* Hampstead Junction Railway Company	1 De G. & J. 446	369
Grove *v.* Price	26 Beav. 103	568
Guy *v.* Sharp	1 My. & K. 589	527
Gwynne *v.* Edwards	2 Russ. 289, n.	542
——— *v.* Heaton	1 Bro. C. C. 1	323

H.

		PAGE
Haldane *v.* Eckford	Law Rep. 8 Eq. 631	300, 631
Hall *v.* Macdonald	14 Sim. 1	572
Hammersmith and City Railway Company *v.* Brand	Law Rep. 4 H. L. 171	419
Hancock *v.* Attorney-General	33 L. J. (Ch.) 661	396
Hanson *v.* Keating	4 Hare, 1	612
Harris *v.* Gandy	1 D. F. & J. 13	480
Harrison, Ex parte	3 Mont. & A. 506	355
——— *v.* Guest	8 H. L. C. 481; 6 D. M. & G. 424	323
Hawkins *v.* Allen	Law Rep. 10 Eq. 246	546
——— *v.* Carbines	27 L. J. (Ex.) 44	370
Haynes *v.* Forshaw	11 Hare, 93	101
Head *v.* Egerton	3 P. Wms. 280	81
Heather *v.* O'Neill	2 De G. & J. 399	556
Heming *v.* Clutterbuck	1 Bli. (N.S.) 479	530
Hemming *v.* Griffith	2 Giff. 403	243
——— *v.* Gurrey	2 S. & S. 311	530
Henning *v.* Burnet	8 Ex. 187	370
Herbert's Trusts, In re	1 J. & H. 121	17
Heydon's Case	3 Rep. 7, a.	121

		PAGE
Hibbert *v.* Cook	1 S. & S. 552	173
Hill's Case	Law Rep. 9 Eq. 605	519
Hill *v.* Edmonds	5 De G. & Sm. 603	611
Hobson *v.* Shearwood	15 W. R. 887	199
Hodgson *v.* De Beauchesne	12 Moo. P. C. 285	301, 627
Holland *v.* Clark	1 Y. & C. Ch. 151	51
——— *v.* Holland	Law Rep. 4 Ch. 449	95
Holmes *v.* Tutton	5 E. & B. 65	138
Hooley *v.* Hatton	Tud. L. C. 313	527
Hope *v.* Potter	2 K. & J. 206	403
Hopgood *v.* Parkin	Law Rep. 11 Eq. 74	376
Hopkinson *v.* Marquis of Exeter	Law Rep. 5 Eq. 63	582
Hoskins *v.* Mathews	8 D. M. & G. 13	633
Hoste *v.* Pratt	3 Ves. 730	428
Howard *v.* Tucker	1 B. & Ad. 712	381
Howden *v.* Crighton	1 Court of Sess. Cas. (1st Series) 18	627
Howe *v.* Earl of Dartmouth	7 Ves. 137	125
Hubbard *v.* Beckford	1 Hagg. Consist. 307	498
Hulme *v.* Tenant	1 Bro. C. C. 16	493
Humble *v.* Mitchell	11 A. & E. 205	355
Hunt *v.* Maniere	34 Beav. 157	143
Hunter *v.* Walters	Law Rep. 11 Eq. 292	81
Hurst *v.* Beach	5 Madd. 351	527

I.

Ibbotson *v.* Elam	Law Rep. 1 Eq. 188	591
Imperial Guardian Life Assurance Society, In re	Law Rep. 9 Eq. 447	28
Incumbent of Whitfield, In re	1 J. & H. 610	77
Inderwicke, Ex parte	2 De G. & Sm. 231	189
Innes *v.* Mitchell	1 De G. & J. 423	153
International Contract Company, In re	14 L. T. (N.S.) 726	28
Ion *v.* Ashton	28 Beav. 379	203
Iredell *v.* Iredell	25 Beav. 485	429
Isaac, Ex parte	Law Rep. 6 Ch. 58	62
Isaacson *v.* Harwood	Law Rep. 3 Ch. 225	95, 156

J.

Jackson *v.* Hobhouse	2 Mer. 483	121
——— *v.* Jackson	2 Cox, 35	530
——— *v.* Woolley	8 E. & B. 784	52
Jeffery *v.* De Vitre	24 Beav. 296	433
——— *v.* Honywood	4 Madd. 398	318
Jenkyn *v.* Vaughan	3 Drew. 419	162
Jenner *v.* Jenner	2 D. F. & J. 359	440
Jervoise *v.* Duke of Northumberland	1 Jac. & W. 559	493
Jesse *v.* Bennett	6 D. M. & G. 609	550
—— *v.* Bloome	3 Atk. 262	412
Jesson *v.* Wright	2 Bli. 1.	561
Johnson *v.* Newton	11 Hare, 160	376
——— *v.* Peck	3 Stark. 66	502
Johnston *v.* Moore	27 L. J. (Ch.) 453	592
Johnstone *v.* Beattie	10 Cl. & F. 42	625
——— *v.* Earl of Harrowby	1 D. F. & J. 183	528

		PAGE
Joint Stock Discount Company *v.* Brown	Law Rep. 8 Eq. 381	274
Jones *v.* Curry	1 Sw. 66	487
—— *v.* Lewis	2 Ves. Sen. 240	376
—— *v.* Williams	Amb. 651	581, 583
Jopp *v.* Wood	28 Beav. 53	626

K.

Kent *v.* Freehold Land and Brickmaking Company	Law Rep. 3 Ch. 493	347
Kern *v.* Deslands	10 C. B. (N.S.) 205	382
Kernot *v.* Potter	3 D. F. & J. 447	21
Kidd *v.* North	2 Ph. 91; 14 Sim. 463	530
Kilpin *v.* Kilpin	1 My. & K. 520	222
Kinnoul (Earl of) *v.* Money	3 Sw. 202	555

L.

Laing *v.* Read	Law Rep. 5 Ch. 4	519
Lancaster *v.* Elce	31 L. J. (Ch.) 789	66
Lance *v.* Aglionby	27 Beav. 65	177
Land's Trust, In re	4 K. & J. 81	491, 538
Larner *v.* Larner	3 Drew. 704	457
Lawrence's Case	Law Rep. 2 Ch. 412	347
Lee *v.* Pain	4 Hare, 201	527, 530
Leiedmann *v.* Schultz	14 C. B. 38	597
Leslie *v.* Macleod	Law Rep. 2 H. L. Sc. 44	627
Lewis *v.* Baldwin	11 Beav. 153	153
—— *v.* Waters	6 East, 336	402
Life Association or Scotland *v.* Siddal	3 D. F. & J. 271	611
Lipscomb *v.* Lipscomb	Law Rep. 7 Eq. 501	542
Loch *v.* Bagley	Law Rep. 4 Eq. 122	493
Loder's Case	Law Rep. 6 Eq. 491	502
Lomas *v.* Holmeden	2 P. Wms. 176	563
—— *v.* Wright	2 My. & K. 769	156
London Cotton Company, In re	Law Rep. 2 Eq. 53	192
Lord *v.* Colvin	4 Drew. 366	625
Loscombe *v.* Wintringham	13 Beav. 87	185
Lovegrove *v.* Cooper	2 Sm. & Giff. 271	572
Loveridge *v.* Cooper	3 Russ. 30	355
Lowe *v.* Thomas	5 D. M. & G. 315; Kay 369	457
Lowndes *v.* Garnett and Moseley Mining Company	2 J. & H. 282	234
Lyall *v.* Paton	25 L. J. (Ch.) 746	469
Lyddon *v.* Ellison	19 Beav. 565	493
Lyne's Trusts, In re	Law Rep. 8 Eq. 65	109
Lucas *v.* Nickells	10 Bing. 157	191
Lumley *v.* Wagner	1 D. M. & G. 604	21

M.

M'Creight *v.* Foster	Law Rep. 5 Ch. 604	15
McDonald *v.* Bryce	2 Keen, 276	562
Mackenzie *v.* Mackenzie	2 Russ. 262	527
McLean *v.* Fleming	Law Rep. 2 H. L., Sc. 126	382
Macrae *v.* Ellerton	6 W. R. 851; 4 Jur. (N.S.) 967	461

		PAGE
Maguire's Trusts, Re	18 W. R. 623	185
Mainwaring *v.* Beevor	8 Hare, 44	429
Malcolm *v.* Malcolm	21 Beav. 225	109
Mansell *v.* Feeny	2 J. & H. 313	234
Marine Mansions Company, In re	Law Rep. 4 Eq. 601	131
Mark's Trust Deed, In re	Law Rep. 1 Ch. 429	65
Marner's Trusts, In re	Law Rep. 3 Eq. 432	112
Marryat *v.* Marryat	28 Beav. 224	156
Marshall *v.* Lamb	5 Q. B. 115	362
Martin *v.* Drinkwater	2 Beav. 215	528
——— *v.* Powning	Law Rep. 4 Ch. 356	63
Martin's Case.	2 H. & M. 669	347
Martyn *v.* McNamara	4 D. & War. 411	162
Mason *v.* Bogg	2 My. & Cr. 443	48
——— *v.* Clarke	17 Beav. 126	434
Mathews *v.* Keble	Law Rep. 4 Eq. 467; Ibid 3 Ch. 691	561
Messenger *v.* Andrews	4 Russ. 478	233
Michell *v.* Michell	5 Madd. 69	177
Midland Railway Company *v.* Taylor	8 H. L. C. 751	378
Millington *v.* Fox	3 My. & Cr. 338	144
Mills *v.* Norris	5 Ves. 335	429
Mitchel *v.* Reynolds	1 P. Wms. 181	608
Mitchell *v.* Scaife	4 Camp. 298	381
Mitford *v.* Mitford	9 Ves. 87	356
——— *v.* Reynolds	1 Ph. 185	583
Moet *v.* Couston	33 Beav. 578	143
Moggridge *v.* Thackwell	1 Ves. 464	530
Mole *v.* Smith	Jac. 490	370
Montague *v.* Earl of Sandwich	33 Beav. 324	457
Moodie *v.* Bannister	4 Drew. 432	52
Moorhouse *v.* Lord	10 H. L. C. 272	301, 625
Mordue *v.* Palmer	Law Rep. 6 Ch. 22	439
Morecock *v.* Dickins	Amb. 678	80
Morice *v.* Bishop of Durham	9 Ves. 399; 10 Ves. 522	579
Morison *v.* Morison	7 D. M. & G. 214	130
Morland *v.* Cook	Law Rep. 6 Eq. 252	15
Morrall *v.* Sutton	1 Ph. 533	561
Morris *v.* Coleman	18 Ves. 437	22
——— *v.* Ogden	Law Rep. 4 C. P. 687	497
——— *v.* Morse	2 Sim. 485	318
Mounsey *v.* Barnham	1 Hare, 15	25
Mountnoy *v.* Collier	1 E. & B. 630	597
Moye *v.* Sparrow	18 W. R. 400	523
Mullock *v.* Jenkins	14 Beav. 628	519
Mundy *v.* Earl Howe	4 Bro. C. C. 223	425
Munro *v.* Munro	7 Cl. & F. 842	625
Murrow *v.* Wilson	12 Beav. 497	113
Musson *v.* May	3 V. & B. 194	156

N.

Natal, &c., Company, In re	1 H. & M. 639	189
National Savings Bank Association, In re	Law Rep. 1 Ch. 547	28
Naylor *v.* Arnitt	1 Russ. & My. 501	125
Nethersole *v.* School for Indigent Blind	Law Rep. 11 Eq. 1	447
Nettleton *v.* Stephenson	3 De G. & Sm. 366	561

		PAGE
Nevill's Case	Law Rep. 6 Ch. 43	2
New *v.* Bonaker	Law Rep. 4 Eq. 655	203
Newhouse *v.* Smith	2 Sm. & Giff. 344	49
Newton *v.* Newton	Law Rep. 4 Ch. 143	81
Nightingale *v.* Goulbourn	5 Hare, 484; 2 Ph. 594	582
Nottidge *v.* Prichard	2 Cl. & F. 379; 8 Bli. (N.S.) 493	72
Nunes *v.* Carter	Law Rep. 1 P. C. 342	362

O.

Oakes *v.* Turquand	Law Rep. 2 H. L. 325	4, 346
Ogle *v.* Knipe	Law Rep. 8 Eq. 434	457
Ommanney *v.* Butcher	T. & R. 260	581
O'Neill *v.* Lucas	2 Keen, 313	561
Oulds *v.* Sansom	3 Taunt. 261	121
Outhwaite *v.* Hudson	7 Ex. 380	597
Overhill's Trusts, In re	1 Sm. & Giff. 362	17
Owens, In re	Law Rep. 12 Eq. 316	434

P.

Parker *v.* Watkins	Joh. 133	119
Parrott *v.* Palmer	3 My. & K. 632	413
Partington *v.* Reynolds	6 W. R. 307	113
Paul *v.* Birch	2 Atk. 621	381
Pawle's Case	Law Rep. 4 Ch. 497	348
Payne *v.* Parker	Law Rep. 1 Ch. 327	549
Pearse *v.* Hewitt	7 Sim. 471	549
Penn *v.* Lord Baltimore	1 Ves. Sen. 455	628
Peppin *v.* Bickford	3 Ves. 570	108
Peto *v.* Brighton, Uckfield, and Tunbridge Wells Railway Company	1 H. & M. 468	21
—— *v.* Hammond	30 Beav. 495	15
Phillips *v.* Furber	Law Rep. 5 Ch. 746	21, 65
Philipps *v.* Chamberlaine	4 Ves. 50	561
Philpott *v.* President of St. George's Hospital	6 H. L. C. 338	203, 545
Pinder *v.* Barr	4 E. & B. 105	497
Plas-yn-Mhowys Coal Company, In re	Law Rep. 4 Eq. 689	195
Ponsardin *v.* Peto	33 Beav. 642	143
Poole *v.* Pass	1 Beav. 600	439
Potinger *v.* Wightman	3 Mer. 67	626
Potter's Trusts, In re	Law Rep. 8 Eq. 52	612
Powell *v.* Graham	7 Taunt. 581	101
——— *v.* Lovegrove	8 D. M. & G. 357	597
Prehn *v.* Royal Bank of Liverpool	Law Rep. 5 Ex. 92	502
Price's Trust Deed, In re	Law Rep. 6 Eq. 460	63
Prichard *v.* Prichard	Law Rep. 11 Eq. 232	457
Pritchard *v.* Draper	1 Russ. & My. 191	72
Professional Life Assurance Company, In re	Law Rep. 3 Ch. 167	130
Prole *v.* Soady	Law Rep. 3 Ch. 220	612
Pryse's Estates, In re	Law Rep. 10 Eq. 531	87
Pulteney *v.* Warren	6 Ves. 73	412
Purvis *v.* Purvis	23 Court of Sess. Cas. (2nd Series) 812	627
Pusey *v.* Desbouverie	3 P. Wms. 315	633

PAGE

R.

Ransome *v.* Burgess . . . Law Rep. 3 Eq. 773 . . 424
Raphael's Trust Estate, In re . . Law Rep. 9 Eq. 233 . . 63
Rawlins *v.* Wickham . . . 1 Giff. 355; 3 De G. & J. 304 322
Reading *v.* Rawsterne . . . 2 Ld. Raymond, 829 . . 151
Reuter *v.* Electric Telegraph Company . 6 E. & B. 341 . . . 252
Richardson, Ex parte . . . 3 Deac. 496 . . . 355
——— *v.* Horton . . . 7 Beav. 112 . . . 162
——— *v.* Younge . . . Law Rep. 10 Eq. 275 . . 49
Ridges *v.* Morrison . . . 1 Bro. C. C. 390, n. . . 530
Ridout *v.* Bristow . . . 1 C. & J. 231 . . . 101
Robertson, In re . . . 23 Beav. 433 . . . 490
——— *v.* Norris . . . 1 Giff. 428 . . . 591
Robinson *v.* Davison . . . 1 Bro. C. C. 63 . . 86
——— *v.* Governors of London Hospital . . . . . 10 Hare, 19 . . . 449
——— *v.* Hicks . . . 3 Bro. P. C. 180 . . 561
——— *v.* Wheelwright . . 6 D. M. & G. 535 . . 121
Robley *v.* Robley . . . 2 Beav. 95 . . . 527
Roch *v.* Callen . . . . 6 Hare, 531 . . . 527
Roddam *v.* Morley . . . 1 De G. & J. 1 . . 49
Roddy *v.* Fitzgerald . . . 6 H. L. C. 823. . . 402
Rose *v.* Bowler . . . . 1 H. Bl. 108 . . . 100
Ross *v.* Estates Investment Company . Law Rep. 3 Ch. 682 . . 346
Rosse's Case . . . . 5 Rep. 13, a. . . . 470
Royal Bank of Australia, In re . . 3 De G. & Sm. 186 . . 114
Ruper *v.* Harrison . . . 2 K. & J. 86 . . . 81
Russell *v.* Clowes . . . 2 Coll. 648 . . . 450
——— *v.* Dickson . . . 4 H. L. C. 293. . . 528
Ryall *v.* Rowles . . . . 1 Ves. Sen. 348; 1 Atk. 165 . 354

S.

St. Albans (Duke of) *v.* Beauclerk . 2 Atk. 630 . . . 530
Salvidge *v.* Hyde . . . 5 Madd. 138; Jac. 151 . 549
Sandeman *v.* Scurr . . . Law Rep. 2 Q. B. 86 . . 381
Sander's Trusts, In re . . . Law Rep. 1 Eq. 675 . . 108
Sanger *v.* Sanger . . . Law Rep. 11 Eq. 470 . . 120
Saunders *v.* Milsome . . . Law Rep. 2 Eq. 573 . . 94
——— *v.* Saunders . . . 3 Jur. (N.S.) 727 . . 441
Schrimshire *v.* Schrimshire . . 2 Hagg. Consist. 295 . . 626
Schroder *v.* Ward . . . 13 C. B. (N.S.) 410 . . 597
Scott *v.* Bentley . . . . 1 K. & J. 281 . . . 320, 627
Sea and River Marine Insurance Company, In re . . . . . Law Rep. 2 Eq. 545 . . 189
Seidler, Ex parte . . . 12 Sim. 106 . . . 113
Shand *v.* Sanderson . . . 4 H. & N. 381; 28 L. J. (Ex.) 278 381
Sharpe *v.* Crispin . . . Law Rep. 1 P. & D. 611 . 634
Sharples *v.* Adams . . . 32 Beav. 213 . . . 82
Shirreff *v.* Willes . . . 1 East, 48 . . . 72
Shore *v.* Wilson . . . . 9 Cl. & F. 399. . . 402
Silk *v.* Prime . . . . 1 Bro. C. C. 138, n. . . 572
Simon *v.* Barber . . . . 5 Russ. 112 . . . 185
Skarf *v.* Soulby . . . . 1 Mac. & G. 364 . . 162

		PAGE
Small *v.* Moates	9 Bing. 574	382
——— *v.* Oudley	2 P. Wms. 427	355
Smith *v.* Cherrill	Law Rep. 4 Eq. 390	162
——— *v.* Death	5 Madd. 371	555
——— *v.* Oliver	11 Beav. 481	204
——— *v.* Reese River Company	Law Rep. 2 Eq. 264; Ibid. 2 Ch. 604; Ibid. 4 H. L. 64	346
——— *v.* Streatfield	1 Mer. 358	306
Smith's Trusts, In re	Law Rep. 9 Eq. 374	112
Somerville *v.* Somerville	5 Ves. 750	301, 625
South Barrule Slate Company, In re	Law Rep. 8 Eq. 688	510
South Wales Railway Company *v.* Wythes	5 D. M. & G. 880	21
Southampton Steamboat Company *v.* Rawlins	13 W. R. 512	104
Spackman *v.* Miller	12 C. B. (N.S.) 659	602
Sparrow, In re	Law Rep. 5 Ch. 662	63
——— *v.* Oxford, Worcester, and Wolverhampton Railway Company	2 D. M. & G. 94	369
Spencer *v.* Topham	22 Beav. 573	555
Spence's Patent Cement Company, In re	Law Rep. 9 Eq. 9	59
Spirett *v.* Willows	3 D. J. & S. 293	161
——— *v.* ———	Law Rep. 4 Ch. 407	612
Spitalfields School, In re	Law Rep. 10 Eq. 671	538
Stannard *v.* Lee	Law Rep. 6 Ch. 346	596
Stammers *v.* Elliott	Law Rep. 3 Ch. 195	616
Stanton *v.* Hall	2 Russ. & My. 175	611
Stephen's Claim	Law Rep. 3 Ch. 753	502
Stephens *v.* Newborough	11 Beav. 403	266
——— *v.* Olive	2 Bro. C. C. 90	162
Stevenson, Ex parte	16 W. R. 95	348
Stewart, Ex parte	11 L. T. (N.S.) 554	355
Stiffe *v.* Everitt	1 My. & Cr. 37	611
Still *v.* Hoste	6 Madd. 192	185
Stocken *v.* Stocken	4 My. & Cr. 95; 4 Sim. 152	424
Stocker *v.* Dean	16 Beav. 161	10
Stokes *v.* Heron	12 Cl. & F. 161	530
Stone *v.* Thomas	Law Rep. 5 Ch. 219	21, 63, 65
Strachan's Estate, In re	9 Hare, 185	538
Streatfield *v.* Streatfield	1 Sw. 447	634
Stringer *v.* Harper	26 Beav. 33	543
Sturgis *v.* Champneys	5 My. & Cr. 97	612
Suggitt's Trusts, In re	Law Rep. 3 Ch. 215	612
Suisse *v.* Lord Lowther	2 Hare, 424	527

T.

Tasker *v.* Small	3 My. & Cr. 63	370
Tate *v.* Williamson	Law Rep. 1 Eq. 528; Ibid. 2 Ch. 55	322
Tatham *v.* Drummond	33 L. J. (Ch.) 438	530
Tatham *v.* Parker	1 Sm. & Giff. 506	138
Taylor *v.* Haygarth	14 Sim. 8	450
——— *v.* Taylor	6 Sim. 246	178
Taylor's Estate, In re	Law Rep. 1 Eq. 495	615
Thompson *v.* Griffin	Cr. & Ph. 317	425
——— *v.* Thompson	9 Price, 464	93
Thomson *v.* Advocate-General	12 Cl. & F. 1	468, 633
——— *v.* Shakespear	1 D. F. & J. 399; Joh. 612	579

		PAGE
Thorpe *v.* Holdsworth	Law Rep. 7 Eq. 139	81
Tidd *v.* Lister	3 D. M. & G. 857	611
Times Life Assurance and Guarantee Company, In re	Law Rep. 9 Eq. 382	28, 60
Tiverton Market Act, In re	26 Beav. 239	490
Tofts *v.* Stephenson	1 D. M. & G. 40	54
Tombs *v.* Roch	2 Coll. 490	542
Totterdell *v.* Fareham Brick and Tile Company	Law Rep. 1 C. P. 674	253
Tower *v.* Lord Rous	18 Ves. 132	177
Townsend *v.* Carus	2 Hare, 257	579
——— *v.* Westacott	2 Beav. 340	161
Trafford *v.* Ashton	2 Vern. 660	110
Trustees of the British Museum *v.* White	2 S. & S. 594	450
Trye *v.* Corporation of Gloucester	14 Beav. 173	204
Tuckey *v.* Henderson	33 Beav. 174	528
Tuckley *v.* Thompson	1 J. & H. 126	133, 462
Turner *v.* Harvey	Jac. 169	322
Twynam *v.* Porter	Law Rep. 11 Eq. 181	119

U.

Udny *v.* Udny	Law Rep. 1 H. L., Sc. 441	300, 626
Upperton *v.* Harrison	7 Sim. 444	462
Utty Dale's Case	Cro. Eliz. 182	470

V.

Vallance, Ex parte	3 Mont. & A. 224	355
Vane (Earl) *v.* Rigden	Law Rep. 5 Ch. 663	232
Vicar of St. Sepulchre, Ex parte	32 L. J. (Ch.) 462; 33 Ibid. 372	538
Vincent *v.* Godson	4 D. M. & G. 546	93
Violett *v.* Brookman	26 L. J. (Ch.) 308	294

W.

Wade *v.* Ward	4 Drew. 602	461
Waite *v.* Combes	5 De G. & Sm. 676	457
Walker's Case	3 Rep. 22, a.	82
Wall *v.* Wall	11 W. R. 298	12
Wallace *v.* Attorney-General	Law Rep. 1 Ch. 1	469
——— *v.* Kelsall	7 M. & W. 264	71
Wallgrave *v.* Tebbs	2 K. & J. 513	582
Walters *v.* Northern Coal Mining Company	5 D. M. & G. 629	415
Ward *v.* Duke of Northumberland	2 Anst. 469	549
——— *v.* Grey	26 Beav. 485	318, 434
——— *v.* Mackinlay	2 D. J. & S. 358	130
Ware *v.* Watson	7 D. M. & G. 348	304
Warrender *v.* Warrender	2 Cl. & F. 488	626
Watmough's Trusts, In re	Law Rep. 8 Eq. 272	203, 546
Watts *v.* Kelson	Law Rep. 6 Ch. 166	370
Webb *v.* Byng	1 K. & J. 580	294
Western Bank of Scotland *v.* Addie	Law Rep. 1 H. L., Sc. 145	346
Wetherhead *v.* Blackburn	2 V. & B. 121	233

		PAGE
Wheelhouse *v.* Calvert	Set. p. 888	480
Whicker *v.* Hume	7 H. L. C. 124	583, 625
Whitbread *v.* Lord St. John	10 Ves. 152	318
——— *v.* Smith	3 D. M. & G. 727	556
White, Ex parte	Law Rep. 6 Ch. 397	362
White *v.* Finlay	24 Court of Ses. Cas. (2nd Series) 38	627
Whitton's Trusts, In re	Law Rep. 8 Eq. 352	112
Wilkinson's Estate, In re	Law Rep. 9 Eq. 343	12
Williams *v.* James	Law Rep. 2 C. P. 577	370
Williamson's Case	Law Rep. 5 Ch. 309	519
Willoughby *v.* Willoughby	1 T. R. 763	81
Wilmot, Ex parte	Law Rep. 2 Ch. 795	162
Wilson *v.* Balfour	2 Camp. 579	362
——— *v.* Moore	1 My. & K. 337	75
——— *v.* Squire	1 Y. & C. Ch. 654	185
——— *v.* Wilson	1 Sim. (N.S) 288	562
Wise, Ex parte	1 Drew. 465	189
Wright *v.* Tuckett	1 J. & H. 266	592
——— *v.* Wilkin	2 B. & S. 232; 7 Jur. (N.S.) 441	232
Wood *v.* Patteson	10 Beav. 541	126
——— *v.* Wood	7 Beav. 183	556
Woodhouselee (Lord) *v.* Dalrymple	2 Mer. 419	17
Woodland *v.* Fuller	11 A. & E. 859	192
Woodroffe *v.* Daniell	7 Jur. 959	151
Wood's Trusts, In re	Law Rep. 11 Eq. 155	112
Wortham *v.* Pemberton	1 De G. & Sm. 644	612
Worthington *v.* M'Craer	33 Beav. 81	568
Wren *v.* Bradley	2 De G. & Sm. 49	606
Wynch *v.* Grant	2 Drew. 312	95, 156

Y.

Young *v.* White	7 Beav. 506	72
Younge *v.* Furse	8 D. M. & G. 756	294

Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

In re CONTRACT CORPORATION.

M. R.
1871
March 4;
April 18.

HUDSON'S CASE.

Winding-up—Compromise with Transferee of Shares—Liability of past Holder of Shares—Principal and Surety.

H. sold and transferred fifty shares in a company to *D.*, who, on the company being wound up within a year after the transfer, was placed on the list of contributories.

The liquidator, with the sanction of the Court, entered into a compromise with *D.*, and, on payment of half the amount due for calls, released him from liability without any reservation of rights against third parties, and placed *H.* on the "B list" of contributories for the amount remaining due on the same shares:—

Held, that this was not a case of principal and surety, but only of statutory liability; and that *H.* was, notwithstanding the compromise with *D.*, still liable as a contributory.

THIS was an application on behalf of *Henry Hudson* to remove his name from the List "B" of the contributories of the *Contract Corporation, Limited.*

Hudson was a holder of fifty shares, of £100 each, in the *Contract Corporation*, on which £10 had been paid up. On the 5th of

M. R. 1871 HUDSON'S CASE.

February, 1866, he transferred the shares to *Abraham Darby*. The transfer deed contained no covenant as to the payment of future calls. On the 23rd of April, 1866, an order was made for winding up the company, and *Darby* was put on the list of contributories for 150 shares: of these 100 shares had been transferred to him more than a year before the period of the winding up of the *Contract Corporation*, and the remaining fifty shares were those transferred to him by *Hudson*.

Darby, and the persons with whom he was in partnership, subsequently became involved, and an inspectorship deed was executed, to which all their creditors were parties; and the official liquidator, with the sanction of the Court, assented to the deed, which was in the ordinary form, and contained no reservation of the rights of the company or of the official liquidator against third parties. Under this deed the liquidator received 10*s.* in the pound on the amount due in respect of calls.

The official liquidator then placed *Hudson* on List "B" of contributories in respect of the said fifty shares.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the Applicant:—

The official liquidator having, with the sanction of the Court, entered into a compromise with *Darby*, the principal debtor, *Hudson*, the transferor of the shares, cannot now be made liable as surety.

The effect of the law on this subject was considered in *Nevill's Case* (1). In that case a contributory, who was a transferee of shares at the date of the winding-up, being unable to pay the calls, an agreement was entered into with the sanction of the Court, by which the liquidator accepted a composition in full discharge of all claims against the contributory, with a stipulation that nothing therein contained should prejudice the rights of the company against any other contributories, whether as past or present members; and it was held, notwithstanding the compromise, that the transferor of the shares in question was still liable as a past member.

That case is, however, no authority for establishing *Hudson's* liability. The decision rested on the condition of the agreement,

(1) Law Rep. 6 Ch. 43.

which expressly reserved the rights of the company against past members; whereas here, in the deed under which the compromise was made, there is no reservation of rights as against third parties. This being so, the ordinary doctrine of principal and surety applies, and the principal debtor being released, it is impossible that the surety can be made liable.

Sir *R. Baggallay*, Q.C., and Mr. *Chitty*, for the official liquidator:—

It is the duty of the official liquidator to realise the assets of the company for the purpose of discharging its liabilities. The assets are of three kinds: first, ordinary assets; then the contributions of the shareholders who are on the register at the date of the winding-up; and then, if necessary, the contributions of past shareholders. The 38th section of the *Companies Act* defines the liability of past and present members of the company, and that which each such member, whether past or present, is liable to contribute in his own liability; the one cannot be surety for the other. The liability of a past shareholder cannot, therefore, be affected by reason of the claim of his transferee having been compromised by the liquidator, with the sanction of the Court, under the *Companies Act*, nor can he complain that he has thus been made liable behind his back, for he is entitled, by the 60th order under the *Companies Act*, to have notice of all proceedings sent to him, and to attend, and if he does not avail himself of this right, he is as much bound as if he actually attended.

The decision in *Nevill's Case* (1), if it applies at all, is in favour of our contention. In *Creyke's Case* (2) it was held that an original shareholder, whose shares had been forfeited before the winding-up, was still liable, and the liability of a past shareholder whether by forfeiture or by transfer of shares, being, as Lord Justice *Giffard* observed, "entirely created by the statute," the doctrine of principal and surety does not apply. The result is, that *Hudson* is properly made a contributory.

Mr. *Jessel*, in reply:—

The relation of principal and surety between the two classes of

(1) Law Rep. 6 Ch. 43. (2) Law Rep. 5 Ch. 63.

M. R. 1871 HUDSON'S CASE.

shareholders *inter se* is not affected by the creditor's right to sue. In *Nevill's Case* (1) that relation is assumed. In *Oakes* v. *Turquand* (2), the rights of creditors and the liability of shareholders were treated as unaffected by the provisions of the *Companies Act*.

In an ordinary case of partnership, a retiring partner is still liable for debts contracted during his partnership, no less than the principal debtor; but as regards the partners between themselves, the relation of suretyship arises, and if a creditor has released the remaining partners, he cannot afterwards sue the remaining partner. So here, as the official liquidator has relieved *Darby* from his liability, and permitted him to retain his property, so that *Hudson* cannot now sue him, *Hudson* cannot now be made liable for the amount of unpaid calls.

April 18. LORD ROMILLY, M.R.:—

This summons, which is adjourned from Chambers, raises a question of very considerable importance, which does not appear to me to be determined by any case that has hitherto been reported.

It may be stated thus: *B.* sells and transfers fifty shares in a company to *A.* The company is wound up. *A.* is put on the list of contributories. The official liquidator, with the sanction of the Court, accepts half of what is due from *A.* for calls on the 100 shares in full discharge of his liability to calls, on the ground that this is all that can be obtained from him. Having done so, the official liquidator then sues *B.* for the remaining half. Is *B.* discharged by reason of this compromise?

B.'s counsel say that he is merely a surety to the company that *A.* will pay the amount due for calls on the 100 shares so transferred; and as the company has compromised with *A.*, it cannot now go against the surety for *A.*'s debt to the company, or any part of it.

The facts which raise the question in this case are very few and simple, and not in dispute.

[His Lordship then stated the facts of the case.]

(1) Law Rep. 6 Ch. 43. (2) Law Rep. 2 H. L. 325, 347.

M. R. 1871 HUDSON'S CASE.

In order to consider this case fully, it is necessary, first, to see what arises from the contract or instrument of transfer between *Hudson* and *Darby*, and what arises from the terms of the statute. The document of transfer of the shares contains no covenant or undertaking of any sort.

The statute (25 & 26 Vict. c. 89), makes Mr. *Hudson* liable under the 38th section, unless he can bring himself within any of the exceptions specified in the succeeding *placita*.

The clause under which the official liquidator is enabled to compromise with a contributory is the 160th. It is to this effect:—

"The liquidators may, with the sanction of the Court, where the company is being wound up by the Court, or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company where the company is being wound up altogether voluntarily, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory, or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company, or the winding up of the company, upon the receipt of such sums, payable at sucht imes, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities."

These two sections must be taken together in considering this question.

One of the first things that strikes me, on considering the effect of these sections, is the difference which the statutory enactment makes in the law. According to law, independently of the statute, the transferor would be liable to pay the debts contracted by the company during the time he was a member, which still remain unpaid to the extent of his liability on his shares, but this would be only conjointly with the other members of the company; but under the Act, as construed by the decisions of the Court, the

M. R.
1871
HUDSON'S CASE.

transferor is liable to pay as much money as remains due on his shares, not conjointly with the other shareholders, and not for the exclusive benefit of the persons who were creditors while he was a member, and who still remain so, but to add to the general fund for the benefit of all the creditors of the concern alike, whether previous or subsequent to the transfer.

This is not the only difference, as will appear presently, when the statute comes to be considered a little more minutely. But the first and leading question on the perusal of the clauses is this: Is this a case of principal and surety at all? Here *B.* is liable for the amount of calls unpaid by *A.*, but how can it be as surety? He has entered into no covenant of suretyship of any sort with any one. He is liable solely because the statute, by the 38th section, makes him so, which defines when and under what circumstances a past member shall escape such liability.

But I see nothing in the statute to make him liable as surety to pay a debt due from the transferee. On the contrary, his liability is that of a debtor to the company who is made to pay the amount due to the company, which the company has not been able to obtain from *A.*, the transferee.

If he were surety, he would be liable to pay the whole, and might first be sued for that purpose; but by the statute he is only liable to pay the balance beyond what can be got from the transferee of the shares, and only after that has been obtained from such transferee.

The official liquidator represents the company. If no winding-up takes place, the transferor *B.* is not liable at all to pay any calls made upon or due from his transferee, which he would be if he were a surety that the transferee would duly perform all the obligations he incurs by taking the shares.

Consider the reasons of the law of principal and surety. It is very well and tersely expressed by Lord Justice *Mellish* in *Nevill's Case* (1): "The question turns upon the construction of the agreement. Was it the intention that the transferor should be discharged as well as the purchaser? Clearly I think not, for the agreement says so in plain terms. Then, is there anything to prevent that agreement from having effect given to it according to

(1) Law Rep. 6 Ch. 47.

M. R. 1871

HUDSON'S CASE.

its terms? It is clear that, even where the principal debtor is released by a formal instrument under seal, if the remedy against the surety is reserved, the surety can be sued. The reason why a simple release of the principal debtor discharges the surety is, that it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in turn would sue him; but where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor, and the Court will give effect to the intention of the parties by construing the release as a covenant not to sue the principal debtor."

If this is a case of suretyship, or if the transferee enters into an implied contract to save his transferor harmless from all matters in respect of the shares so transferred to him, independently of the statute, then the transferee is still liable to be sued by the transferor at law, but the matter regarded by the law is not the injury which falls on the surety, but the injury which falls on the person for whom he is surety. It is not, therefore, the transferor who is regarded in the matter, but the transferee; and, accordingly, the compromise does not, in a case of suretyship, discharge the surety if due notice is given to the debtor that the creditor intends to proceed against the surety, so that this liability of the surety is excepted out of the terms of the compromise. This is decided by numerous cases, especially *Nevill's Case* (1), to which I have just referred. But observe how that operates in the case of an official liquidator: the transferor cannot sue the transferee except with the leave of the Court, and in the name and through the official liquidator.

This is established by *Oakes* v. *Turquand* (2), which expressly decides that proceedings by one contributory against another must be instituted through the official liquidator, and in this case the official liquidator cannot sue Mr. *Darby*, because the compromise already entered into with him, and sanctioned by the Court, precludes the official liquidator from doing so.

The great mistake which is made in these cases is that of supposing that the rule of law prevails for the benefit of the

(1) Law Rep. 6 Ch. 43. (2) Law Rep. 2 H. L. 325.

M. R. 1871 HUDSON'S CASE.

surety, whereas it does so for the benefit of the debtor, for whom he is surety, in order that the debtor may not be entrapped into a compromise, which is merely illusory, and would still leave him at the mercy of the surety instead of the original creditor.

Now what is the liability of the transferor to the company? It arises solely out of this Act, by virtue of the 38th section, which makes him liable to the full extent that remains unpaid by the holder of the shares, unless he happens to fall within one of the exceptions specified in the *placita* of that clause. I do not mean by this observation to say that the transferor in all cases is wholly without remedy, or that in fact power is given to the official liquidator, or to the Court, to shift the burden from the shoulders of one man to those of another, or to make the transferor pay the transferee's debts. Fraud, it is clear, would vitiate any transaction. Partiality to make *B.* pay what *A.* ought, and is able to pay, is fraud; but I go further than this, and I think that if the transferor could shew that the compromise was an improper one, and that the Court had been misled into giving its sanction to it, the Court would, as I apprehend, find some way either of upsetting the whole transaction or of relieving the transferor. But no such case arises here; on the contrary, so far as Mr. *Hudson* is concerned, I believe that he benefits by the compromise, and that less would have been obtained from Mr. *Darby* by resorting to the extreme measure of the law, than by accepting the composition offered, if the expense and delay are taken into consideration, in which I regard not merely the expense of proceedings against Mr. *Darby*, but also the great expense occasioned by delaying the winding up of these most troublesome and costly concerns.

My short opinion is, that this is not a case of principal and surety at all, but that it is a mere case of statutory liability created independently of any such question, and not subject to it; and further, that, if it were a case of principal and surety, that doctrine applies for the benefit of the principal debtor; and that, inasmuch as by the terms of the compromise entered into, he cannot be sued by the surety, the doctrine of the immunity of the surety does not arise. I am also further of opinion that, as the compromise was a fair and proper one, and that by it all that could be obtained from the principal debtor was obtained from him, the

surety has no ground for complaint, and consequently that he must remain on List "B" as one of the contributories in respect of the fifty shares so sold and transferred by him.

M. R. 1871 HUDSON'S CASE.

Solicitors for the Applicant: Messrs. *Torr, Janeway, Tagart, & Janeway.*

Solicitors for the Official Liquidator: Messrs. *Linklater, Hackwood, Addison, & Brown.*

HIGHGATE ARCHWAY COMPANY *v.* JEAKES.

M. R. 1871 *March* 23; *April* 20.

Specific Performance—Right of Pre-emption in the "Person" of whom Land was purchased—Highgate Archway Company's Act (50 *Geo.* 3, *c.* 88), *ss.* 52, 53.

By the *Highgate Archway Company's Act* (50 Geo. 3, c. 88), ss. 52, 53, the company were empowered to re-sell or dispose of part of the lands which they were by the Act authorized to purchase, provided that they should first offer the same to the person or persons of whom the same had been purchased:—

Held, that the right of pre-emption was limited to the actual vendors to the company, and could not be claimed by their successors in title.

Specific performance of an agreement entered into with the company for a lease of such land after the death of the vendor, without any offer of pre-emption to his heirs or assigns, decreed.

THIS was a suit by the *Highgate Archway Company* for specific performance of an agreement for a lease.

By the Act of 50 Geo. 3, c. 88, the *Highgate Archway Company* were empowered to make and maintain a road with an archway through the east side of *Highgate Hill.* The Act contained the following provisions:—

Sect. 52: "Whereas the said company may be compelled to purchase lands, tenements, and hereditaments not necessary to be made use of for the purposes of this Act; be it therefore enacted, that it shall and may be lawful for the said company to sell and dispose of, and to grant and convey in fee, or to demise for a term of years, such part or parts of the lands, tenements, and hereditaments as may be purchased by the said company, and as shall not be wanted for the purposes of the said road or archway and works to be made by virtue of this Act.

M. R.
1871
HIGHGATE ARCHWAY COMPANY v. JEAKES.

Sect. 53: "Provided always, that the said company, before they shall sell and dispose of any lands or hereditaments hereby authorized to be sold, shall first offer the same to the person or persons of whom the same were purchased by the said company."

In 1811 the company purchased certain land for the purposes of their Act of two persons, who had long since died. In 1869 they entered into an agreement with the Defendant to demise to him part of the land so purchased for the term of 999 years.

The Defendant did not dispute the contract, but contended that the Plaintiffs, before disposing of the land in question to him by way of demise, were, under the 53rd section of their Act, first bound to offer the same to the heirs or assigns of the persons of whom the lands were purchased, and he refused to perform the agreement unless and until they should, on such offer being made to them, concur in the proposed lease or refuse the offer.

The Plaintiffs submitted that the persons of whom the company had purchased the land being dead, the right to pre-emption under the Act did not descend to their representatives.

Mr. *Jessel*, Q.C., and Mr. *Charles Hall*, for the Plaintiffs:—

The right of pre-emption which, under the 53rd section of the Act (50 Geo. 3, c. 88), is to be given by the company to the "person or persons of whom the lands were purchased" before disposing of them, is limited to the actual vendor or vendors. When a man sells his property, his successor in title cannot, except by express words of reservation, have any right or interest in it. In construing such a clause as the one in question, the ordinary grammatical meaning must be given to it, unless it leads to an absurd result. This contention is illustrated by the converse case of *Stocker* v. *Dean* (1), where a right of pre-emption could not be enforced after the death of the owner of the property. Besides, after the lapse of nearly sixty years, it might be impossible to ascertain who is the successor of the original vendor to whom the supposed option to purchase is to be given.

If the same words were used in a will, there could be only one construction, namely, that the testator intended the offer of pre-emption to be made to the actual person of whom he had pur-

(1) 16 Beav. 161.

chased. Such a right of pre-emption is not deviseable nor descendible, and there being now no one to whom the first offer is to be made, the result is, that the objection fails, and the Plaintiffs are entitled to a decree.

Sir *R. Baggallay*, Q.C., and Mr. *R. C. Palmer*, for the Defendant:—

The right of pre-emption under the Act was part of the original title of the property, and passed to the heirs, executors, or assigns, as the case might be, of the persons from whom the purchase was made. It was reserved for the benefit of the inheritance, and cannot be affected by the death of the vendor. Supposing a vendor to the company had died within a year after he had sold his land, could it be said that his heir or devisee had no claim to pre-emption under the Act? And if the company would then have been bound to make the offer under the 53rd section, they are no less bound now; at any rate, the point is too doubtful for a decree for specific performance to be made.

Mr. *Jessel*, in reply.

April 20. LORD ROMILLY, M.R.:—

The question solely depends on the construction of the 52nd and 53rd sections of the Statute of 50 Geo. 3, c. 88, being an Act which, for shortness, may be termed the *Highgate Archway Company's Act*, enabling the company to make and maintain a road through the east side of *Highgate Hill* from *Upper Holloway* to a spot near the fifth milestone in the parish of *St. Mary, Hornsey*.

[His Lordship then read the sections.]

The company have agreed with the Defendant to demise the land in question, which is part of the land bought by them under the powers of their Act, for a term of 999 years.

The contract is admitted; the only question is one of title; and, except on this point, the title is admitted. The persons from whom the land was bought are dead. The company say they are therefore discharged from the necessity of offering the land to anybody else by way of pre-emption. The Defendant says this right descends to the representatives of the original vendors.

M. R. 1871 HIGHGATE ARCHWAY COMPANY v. JEAKES.

In every mode of examining it which I have been able to apply, I can give no other meaning to the word "person" than the limited meaning of the actual person who sold the land, and I think that on his death this right ceased, and could not afterwards be exercised by any one. I am of opinion that the decree must be made for specific performance, with a reference to Chambers to settle the conveyance in case the parties differ.

Solicitor for the Plaintiffs: Mr. *E. A. Paterson.*
Solicitor for the Defendant: Mr. *W. Hammond.*

M. R. 1871 *April* 21.

In re COOK'S SETTLED ESTATES.

Settled Estate — Sale — Interim Investment of Purchase-money — Leases and Sales of Settled Estates Act (19 & 20 *Vict. c.* 120), *s.* 25—23 & 24 *Vict. c.* 38, *ss.* 10, 11.

Money received by trustees upon a sale under the *Leases and Sales of Settled Estates Act* may be invested in any of the investments in which cash under the control of the Court may be invested.

THIS was a Petition, under the *Leases and Sales of Settled Estates Act*, praying that a provisional contract for the sale of a settled estate might be confirmed, and that directions might be given for the payment of the purchase-money to trustees, and for the interim investment thereof in any of the investments in which cash under the control of the Court may be invested.

The order had been made as prayed, but the Registrar refused to draw it up, on the ground that sect. 25 of the *Leases and Sales of Settled Estates Act* expressly provides that the interim investment shall be in consols or exchequer bills.

Mr. *Ingle Joyce* now mentioned the matter to the Court, and referred to *Wall* v. *Hall* (1); *In re Birmingham Blue Coat School* (2); *In re Wilkinson's Estate* (3).

THE MASTER OF THE ROLLS directed the order to be drawn up.

Solicitor: Mr. *Daniel Birt.*

(1) 11 W. R. 298. (2) Law Rep. 1 Eq. 632.
(3) Law Rep. 9 Eq. 343.

CRABTREE *v.* POOLE.

M. R.
1871
April 25;
May 1.

Vendor and Purchaser—Assignment of Contract—Subsequent Conveyance by Vendor to a Stranger.

A vendor agreed to sell a piece of land to *M.* with immediate possession, the purchase to be completed in five years. Before completion, *M.* agreed to sell the land to *C.*, and the agreement was registered in the district registry, with a receipt for part of the consideration-money which *C.* had laid out for *M.* in buildings on the land. *C.* offered to pay the vendor the amount agreed upon between him and *M.*, and applied for the delivery of the abstract, but the vendor refused to convey to him the land in question unless he would purchase other land also agreed to be sold to *M.*, and shortly afterwards the vendor and *M.* conveyed the land to *H.* On a bill filed by *C.* against the vendor, *M.*, and *H.*, alleging that *H.* had constructive notice of his title, and praying a conveyance of the estate:—

Held, that, whether *H.* had such notice or not, the conveyance to him could not be set aside.

BY agreement dated the 26th of September, 1867, the Defendant *Poole* agreed to sell to the Defendant *Mortimer* a plot of ground at *Bradford, Yorkshire*, described in the pleadings as "the warehouse plot," for £453. *Mortimer* was to be let into possession at once, and was to complete the purchase within five years, and until completion pay interest on the purchase-money, but was to be at liberty, if he thought fit, to complete at any earlier period.

Mortimer took possession, and employed the Plaintiff to build a warehouse on the ground. He thus became indebted to the Plaintiff in £635. On the 10th of March, 1869, by written agreement, *Mortimer* agreed to sell the property to the Plaintiff for £1088, subject to the provisions of the agreement with *Poole*, and a receipt was indorsed for £635, the debt to the Plaintiff being then satisfied. This agreement was duly registered in the *West Riding* registry.

On the 29th of May, 1869, the Plaintiff sent *Poole* a notice stating his readiness to pay the £453, and calling for an abstract of title. In January, 1870, the Plaintiff's solicitor, on searching the registry for another purpose, discovered that *Poole* and *Mortimer* had, on the 24th of December, 1869, conveyed the warehouse plot, and also an adjoining property called "the mill plot," to the Defen-

M. R. 1871 CRABTREE v. POOLE.

dant *Holdsworth* absolutely. The Plaintiff thereupon filed his bill against *Poole, Mortimer*, and *Holdsworth*, alleging that *Holdsworth* had constructive if not actual notice of his title, and praying for a conveyance of the warehouse plot to him on payment of the £453.

Holdsworth, by his answer, stated that by agreement dated the 7th of June, 1866, *Poole* had agreed with *Mortimer* to sell him the mill plot and a mill, which *Poole* was to erect upon it, at the price of 10*s.* per yard for the ground, and the cost of building. *Mortimer* was to complete within five years, and pay interest at £7 per cent. till completion. *Poole* required *Mortimer* to find sureties for the completion of his part of the bargain, and *Holdsworth* became one of such sureties. On the 30th of April, 1867, the mill having been completed, the total price was fixed at £3000. In November, 1869, *Mortimer* being in difficulties, *Poole* called on *Holdsworth* to pay the interest, and told him that he should henceforth look to him for the performance of the agreement. An interview took place between *Poole, Mortimer*, and *Holdsworth* in December, when *Holdsworth* proposed to buy the mill plot, to which *Poole* replied that the mill plot and warehouse plot must not be separated, and that *Holdsworth* might have both for £4000. *Holdsworth* ultimately agreed with *Poole* and *Mortimer* to buy the two for £3450, and this verbal agreement was carried out by two deeds of the 24th of December, 1869, distinct conveyances being taken, as *Poole* had mortgaged the mill plot. *Holdsworth* went on to deny all notice of the Plaintiff's title till some weeks after completion.

Poole, by his answer, filed just after that of *Holdsworth*, gave substantially the same account of the transaction, but further stated that *Mortimer*, in the course of erecting his warehouse on the warehouse plot, used the wall of the mill on the mill plot as if it had been his own, by inserting joists into it, and that *Poole* objected, and that at last it was expressly agreed that *Mortimer* should be allowed to go on, but that *Poole* should not be obliged to convey the warehouse plot without the mill plot. He further stated that, before the agreement of the 10th of March, 1869, he saw the Plaintiff, of whose being in negotiation for the purchase of the warehouse plot he was aware, and told him of this agree-

ment, and that the Plaintiff refused to purchase both plots, and that thereupon he (*Poole*) told him that he should take the first opportunity of conveying both together.

Sir *R. Baggallay*, Q.C., and Mr. *Miller*, for the Plaintiff:—

This case is distinguishable from *M'Creight* v. *Foster* (1), where it was held that a vendor of land might receive the balance of the purchase-money and convey the estate to a purchaser without regard to the receipt of a notice that the purchaser had agreed to assign the contract by way of mortgage. Here the Plaintiff is not a mortgagee, but an assignee of the whole contract, and he is entitled to call on the vendor to perform it *in toto*.

[They referred to *Peto* v. *Hammond* (2), *Morland* v. *Cook* (3), and *Fagg* v. *James* (4).]

Mr. *Southgate*, Q.C., and Mr. *Streeten*, for the Defendant *Poole*, and Mr. *Jessel*, Q.C., and Mr. *Cadman Jones*, for the Defendant *Holdsworth*, were not called on.

May 1. LORD ROMILLY, M.R.:—

This is, in point of fact, an application by the Plaintiff for specific performance of an agreement entered into by the Plaintiff with *Mortimer*.

[His Lordship then stated the facts of the case:—]

It is said that *Holdsworth* had notice of the contract with the Plaintiff, and that the contract between *Mortimer* and the Plaintiff was registered; but that, in my view of the case, is immaterial. I think this is a weaker case than *M'Creight* v. *Foster*. Here the Plaintiff was told, and knew perfectly well, that *Poole* would not sell one of the plots without the other. In *M'Creight* v. *Foster*, though the case was a much stronger one, the Lord Chancellor held that, though the Plaintiff there had advanced a large sum of money on the security of the contract, notice would not prevent the vendor from conveying away the estate and receiving

(1) Law Rep. 5 Ch. 604.
(2) 30 Beav. 495.
(3) Law Rep. 6 Eq. 252.
(4) 8 L. T. (N.S.) 5.

M. R. 1871 CRABTREE v. POOLE.

the money. The present case is governed by that, and the bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Duncan & Murton*, agents for Mr. *G. Humble, Bradford.*

Solicitors for the Defendants: Messrs. *Gold & Son*, agents for Mr. *Harle, Bradford;* Messrs. *Field, Roscoe, & Co.*, agents for Messrs. *Taylor & Co., Bradford.*

M. R. 1871 *May* 29.

PAUL *v.* CHILDREN.

Will—Gift to Child or Children of C.—Illegitimate Child.

1 Ch. D. 648

Testator, after giving a share of his property by his will upon trust for his niece *B.* and her husband, and for her child, if only one, or all her children, if more than one, gave another share upon such trusts in favour of his niece *C.* and her husband, and her child or children, as should correspond with the preceding trusts in favour of *B.*

C. had only one child, born before her marriage, and illegitimate. She was fifty years old at the date of the will, and fifty-seven years old at the date of a subsequent codicil:—

Held, that, on the death of *C.*, her illegitimate child was not entitled.

TESTATOR, by his will, made in 1858, gave two shares of his property as follows:—"As to one fourth part of the annual income of the said four-tenth parts, upon trust to pay the same unto my niece *Sarah Bartholomew*, the wife of *Benjamin Bartholomew*, during her life, and after the decease of my same niece, upon trust to pay one-half of the same annual income to the said *Benjamin Bartholomew* during his life, and subject to the trusts in favour of the said *Benjamin Bartholomew* and *Sarah* his wife, as to the capital of the same one-fourth part and annual income thereof in trust for the child, if only one, or all the children, if more than one, of my said niece *Sarah Bartholomew* who, either before or after the determination of the previous trusts, shall attain the age of twenty-one years, and (if more than one) equally; and as to the remaining fourth part of the said four-tenth parts and the annual income thereof, as the case may require, upon such trusts, in favour of my niece *Susanna Children* and her husband

Richard Children, and her child or children, as shall correspond with the preceding trusts in favour of the said *Sarah Bartholomew* and *Benjamin Bartholomew*, and her child or children."

There were several codicils, one shortly before the testator's death, not affecting the gift in question.

The testator died in 1865. His niece *Susannah Children* died in 1869, leaving one illegitimate daughter, born before her marriage, her surviving. She never had any other children.

At the date of the will *Susannah Children* was fifty years of age, and at the date of the last codicil she was fifty-seven.

The suit was instituted for the administration of the testator's estate, and the question arose whether the illegitimate daughter of *Susannah Children* was entitled under the will. The testator was acquainted with his niece Mrs. *Children*, but the evidence was conflicting as to his knowledge respecting the child who now claimed under the will.

Mr. *Roxburgh*, Q.C., and Mr. *Haddan*, for the Plaintiffs, the trustees.

Mr. *Morshead* (Mr. *Jessel*, Q.C., with him), for the illegitimate daughter of Mrs. *Children*, contended that, as the testator must be taken to have known that his niece neither had, nor was likely to have, any other child, the daughter was entitled.

Sir *R. Baggallay*, Q.C., and Mr. *Ellis*, for other parties.

The following cases were referred to: *Edmunds* v. *Fessey* (1); *In re Herbert's Trusts* (2); *In re Overhill's Trust* (3); *Lord Woodhouselee* v. *Dalrymple* (4); also *Hawkins* on Wills (5).

LORD ROMILLY, M.R., held that, under the words "her child or children" in this will, the illegitimate daughter could not take.

Solicitors: Messrs. *Mercer & Mercer*, agents for Messrs. *Mercer & Edwards, Deal;* Messrs. *Lydall & Sweeting*, agents for Messrs. *Elwin & Son, Dover;* Messrs. *Westall & Roberts.*

(1) 29 Beav. 233. (3) 1 Sm. & Giff. 362.
(2) 1 J. & H. 121. (4) 2 Mer. 419.
(5) 1st Ed. p. 82.

M. R.

1871

April 17, 18, 21.

MERCHANTS' TRADING COMPANY *v.* BANNER.

Shipbuilding— Contract—Specific Performance—Negative Stipulation— Injunction.

A firm of shipbuilders agreed to alter a vessel according to a specification; and it was provided that in case of their failing to execute the alterations according to the agreement the owners of the vessel should be at liberty, with workmen, to enter on the shipbuilders' yard, and themselves complete the alterations. The shipbuilders were adjudicated bankrupts before the vessel was completed:—

Held, that the Court could not specifically perform the whole agreement, and therefore would not restrain the trustee under the bankruptcy from selling the dock in which the vessel was lying, although the owners might be thus prevented from themselves entering and completing the vessel pursuant to the agreement.

THIS was a demurrer. The bill contained allegations to the following effect:—

The Plaintiffs, being the owners of a screw steamship called the *Bolivian*, and being desirous that certain alterations should be made in the vessel, in the month of January, 1870, entered into a contract for that purpose with a firm of *W. C. Miller & Sons*, then carrying on business as shipbuilders at *Garston*, near *Liverpool*. The agreement (the terms of which were in writing) provided that Messrs. *W. C. Miller & Sons* should cut in two, lengthen, complete, and finish for the Plaintiffs the screw steamship *Bolivian* in accordance with a specification, and would use their best endeavours to complete, finish, and duly deliver to the Plaintiffs the said steamship with all reasonable despatch, and contained provisions authorizing the Plaintiffs' engineer to inspect the ship at all reasonable times; and in consideration of the premises the Plaintiffs agreed to pay to Messrs. *W. C. Miller & Sons* for the price of such alterations and additions of and to the said steamship the sum of £27,600 by the instalments and at the times therein mentioned; and Messrs. *W. C. Miller & Sons* were to have a lien on the ship for securing the due payment of all the instalments. The agreement then proceeded as follows:—

"Provided also, and it is hereby agreed and declared by and between the said parties hereto that during the alteration of the

said steam-vessel so much and such parts of the said steam-vessel, and of her engines, boilers, and machinery, as shall be added to, and built in and to, the said vessel shall be deemed to be, and shall be, the property of the said company, its successors or assigns, but without prejudice to the lien of the said *W. C. Miller & Sons* for any unpaid instalments; and in case the said *W. C. Miller & Sons* shall refuse, neglect, or fail to carry on and complete the said steam-vessel according to the true intent and meaning of these presents, then and in that case the said company, its successors or assigns, shall be entitled not only to the possession of so much and such parts of the said steam-vessel, and of her engines, boilers, and machinery, as shall be built in, and added to, the said steamship, but also to all such articles, matters, and things as shall be then lying and being in and about the said yard and wharf as shall by the said *W. C. Miller & Sons* be intended for the alteration and completion of the said steamship, on the terms that the said company shall pay to the said *W. C. Miller & Sons*, their executors, administrators, or assigns, such a reasonable amount as shall be ascertained by arbitrators, as hereinafter mentioned, to be the value of the said articles in the condition in which the same may be at the time. And it is hereby further agreed that in case of such refusal or failure as aforesaid it shall and may be lawful for the said company, its successors or assigns, with workmen or others, to enter and go into the yard or dock of the said *W. C. Miller & Sons* wherein the said vessel shall be building or be in progress of construction, and either to take away the said steam-vessel, or parts thereof, and the said engines, boilers, and machinery, or parts thereof, or to employ workmen to finish the same, without any molestation or hindrance whatsoever from the said *W. C. Miller & Sons*, their executors, administrators, or assigns, or the workmen or other persons employed by them, and without making any allowance for the use of the said dockyard, machinery, or premises."

Messrs. *W. C. Miller & Sons* subsequently to entering into the agreement took the vessel into the dock at *Garston* in which they carried on business, and they proceeded to cut the vessel in two, but made no further progress with the alterations. The vessel was still lying in the dock, cut in two pieces.

M. R.
1871
MERCHANTS' TRADING COMPANY v. BANNER.

In November, 1870, Messrs. *W. C. Miller & Sons* were adjudicated bankrupts, and the Defendant was appointed trustee under their bankruptcy. As such trustee the Defendant caused advertisements to be issued of the sale of the graving-dock, machinery, and other property of Messrs. *W. C. Miller & Sons.* Amongst the property so intended to be sold were divers articles intended for the alteration and completion of the *Bolivian.* The advertisement took no notice of the Plaintiffs' rights under their agreement.

The bill prayed for a declaration that the Plaintiffs were entitled to complete the alterations in the said steamship *Bolivian* agreed to be executed by the said *W. C. Miller & Sons,* and that the Plaintiffs and their workmen were entitled to enter upon, go into, and use the graving-dock, workshops, machinery, and premises of the said *W. C. Miller & Sons* in which the said ship was, and the said alterations were being carried on, without making any allowance for the use of the said dockyard, machinery, and premises, and that the Plaintiffs were entitled to all such articles, matters, and things lying in or about the said yard or wharf of the said *W. C. Miller & Sons* as were intended by them for the alteration and completion of the said steamship, upon paying for such articles, matters, and things in the manner provided for by the said agreement; and for an injunction to restrain the Defendant from selling or otherwise dealing with the dock in which the said steamship was lying, and the workshops, machinery, and premises in and by means of which the said alterations in the said ship were being made, in such manner as to exclude or interfere with the right of the said company, their successors or assigns, to complete the alteration in the said steamship in the said dock, and their right, and the right of their workmen, to enter and go into the said dock and yard, and to use the said dock, workshops, machinery, and premises for completing the alterations in the said steamship; and that the Defendant might in like manner be restrained from removing the said ship or the said machinery from the said premises, and from removing or selling the articles, matters, and things lying and being in or about the said dockyard and premises which were intended by the said *W. C. Miller & Sons* for the alterations and completion of the said steamship, the Plaintiffs being willing,

and thereby offering, to pay for such articles, matters, and things according to the said agreement.

Mr. *Swanston*, Q.C., and Mr. *H. A. Giffard*, for the demurrer :—

First: The Court will not enforce the stipulation that the Plaintiffs should be at liberty to enter upon the premises of Messrs. *W. C. Miller & Sons*, because it is merely ancillary to an agreement of which, as a whole, the Court cannot enforce specific performance. It is true that the Court will sometimes enforce a distinct negative stipulation forming part of an agreement of which the Court cannot compel specific performance: *Lumley* v. *Wagner* (1); but it will not interfere where it has not control over the parties, and is unable to do justice between them: *Brett* v. *East India and London Shipping Company* (2); *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Railway Company* (3); *Blackett* v. *Bates* (4); *South Wales Railway Company* v. *Wythes* (5); *Kernot* v. *Potter* (6).

Secondly: Even if the stipulation were of that class which the Court could enforce, although it could not decree specific performance of the agreement as a whole, still the particular stipulation here sought to be enforced is too vague to permit of the Court giving any relief in respect of it. The Plaintiffs' claim amounts to a license for an indefinite number of persons to enter upon the Defendant's property for an indefinite length of time. It may be that it is a hard case on the Plaintiffs; but the hardship is caused by the bankruptcy of Messrs. *Miller*, and not by the breach of the agreement.

Thirdly: As to the chattels, they were in the order and disposition of the bankrupts, and the Court will not restrain the trustee from selling them.

Fourthly: The Court of Bankruptcy has jurisdiction in the matter: *Bankruptcy Act*, 1869, ss. 65, 66, 72; *Ex parte Anderson* (7); and the Court of Chancery, even if it has concurrent jurisdiction, will not interfere in the absence of special reasons: *Stone* v. *Thomas* (8); *Phillips* v. *Furber* (9).

(1) 1 D. M. & G. 604.
(2) 2 H. & M. 404.
(3) 1 Ibid. 468.
(4) Law Rep. 1 Ch. 117.
(5) 5 D. M. & G. 880.
(6) 3 D. F. & J. 447.
(7) Law Rep. 5 Ch. 473.
(8) Ibid. 219.
(9) Law Rep. 5 Ch. 746.

M. R.

1871

MERCHANTS' TRADING COMPANY v. BANNER.

Sir *R. Baggallay*, Q.C., and Mr. *Rowcliffe* for the bill:—

[The MASTER OF THE ROLLS intimated that he did not wish to hear any argument as to the question of jurisdiction.]

The first part of the agreement is an ordinary contract for the execution of certain repairs on a ship; and no question arises as to that. Then follow certain provisions which only come into operation in the event of the previous stipulations not being executed. Suppose that Messrs. *W. C. Miller* had contracted that, in the event of the ship not being completed before the 31st of December, 1870, they would grant a lease of the dock to the Plaintiffs from that day: would not the Court specifically perform that? Instead of that, they contract to give the Plaintiffs leave to enter and perform the alterations themselves.

[The MASTER OF THE ROLLS:—How can the Court perform that? How, for example, can the Court determine what number of men you are to employ?]

Sir *R. Baggallay*:—All I ask is, that the Defendant may be restrained from interfering with us in the exercise of the right we have contracted for: if we employ too many men, or are guilty of delay, the Court can readily deal with that. In fact, there can be no more difficulty in this case than there was in *Lumley* v. *Wagner* (1).

Mr. *Swanston*, in reply, referred to *Bliss* v. *Smith* (2).

April 21. LORD ROMILLY, M.R.:—

I cannot avoid allowing the demurrer in this case. It appears to me totally impossible to give any relief upon this agreement in a Court of Equity. I am of opinion that this must be looked at exactly as if it were a suit for specific performance without any bankruptcy at all; and that the Defendant, or rather the persons for whom the Defendant is a trustee, have either refused or declined to perform the agreement. The agreement

(1) 1 D. M. & G. 604. (2) 34 Beav. 508.

is of a singular description. If this agreement could be specifically enforced, what railway contract is there for making a tunnel, or the like, that could not be specifically enforced? The two things are really very much of the same character. There is a stipulation that if Messrs. *Miller* refuse or neglect to perform the contract (which in my opinion they have done, for I think that the bankruptcy amounts to that) there is a power to the Plaintiff to take possession and complete the vessel. That exists in all railway contracts; and the only difference is this, that in railway contracts there is usually added (at least in all those which I have seen) a provision to charge the person with whom they have made the contract with the expenses of performing the contract. But that is not so here. It is merely a power to enter. That can make no difference, and it appears to me to be a contract which the Court cannot possibly perform. Then, as was laid down by Lord *Eldon* in *Clarke* v. *Price* (1), if the Court cannot perform the contract as a whole, it will not enforce performance of a part; and if there is any remedy it must be at law. In *Morris* v. *Colman* (2) and *Lumley* v. *Wagner* (3) there appear to have been some grounds on which it was held that those cases were taken out of the rule. In the former case Lord *Eldon* granted an injunction because the Defendant, as part of a partnership transaction which he and the Plaintiff had entered into as proprietors of the *Haymarket Theatre*, had agreed to write plays for that theatre, while his partner was to get up the performances. In *Lumley* v. *Wagner* the Court seems to have treated it as if there was a separate and distinct contract in which one said, "In consideration of my doing so and so, you shall not perform for anybody else." Thereupon the Court enjoined the Defendant from performing in any other place. At all events, I do not think any of the cases touch the real principle, which is, that where the stipulation sought to be enforced is really a part of the contract itself, this Court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all; and where the Court cannot perform it in its entirety, neither can it perform any particular portion of it. Here it is obvious that the contract cannot be performed in its entirety. The

(1) 2 Wils. C. C. 157. (2) 18 Ves. 437.
(3) 1 D. M. & G. 604.

M. R. 1871 MERCHANTS' TRADING COMPANY v. BANNER.

result, no doubt, is that a very serious evil is inflicted upon the *Merchants' Trading Company;* but I think, under the *Bankruptcy Act,* the parties will be able to get such relief as in the case of any person who has a large claim upon a bankrupt which he cannot obtain in any other form, or in any other way. I presume the Court of Bankruptcy will give them some means of getting their vessel out of the dock, and the like. At all events, I am of opinion that I cannot do it by specific performance; and therefore I allow the demurrer.

Solicitors: Messrs. *Reed, Phelps, & Sidgwick;* Messrs. *Gregory, Rowcliffes, & Rawle.*

M. R. 1871 *April* 19.

FINCH *v.* WESTROPE.

Practice — Unfounded Allegations in Bill—Answer—Re-amended Bill—Costs occasioned by Charges subsequently withdrawn.

When charges of misconduct are introduced into a bill, and are denied by the answer and then withdrawn, the Court will, at the hearing, make an order for payment by the Plaintiff of all the costs occasioned by such unfounded charges without any special application for the purpose.

The practice in *Mounsey* v. *Barnham* (1) not followed.

THIS was a suit for the administration of a testator's estate. The Defendants, who were the executors, put in their answer. The Plaintiff then amended his bill, and introduced various charges of misconduct against the Defendants.

The Defendants put in a further answer to the interrogatories to the amended bill, denying the charges, whereupon the Plaintiff re-amended his bill, and struck out the charges so denied.

The usual administration decree was made, and the only question was as to the costs occasioned by the introduction of these charges into the bill.

Mr. *Southgate,* Q.C., and Mr. *Davey,* for the Defendants, asked to be allowed the costs in question.

Sir *R. Baggallay,* Q.C., and Mr. *Rigby,* for the Plaintiff, contended

(1) 1 Hare, 15, 22.

that such an order as to costs could not be made at the hearing, except on special application: *Mounsey* v. *Barnham* (1).

THE MASTER OF THE ROLLS said that it was not the practice in that branch of the Court to require a special application to be made for such a purpose; and ordered the Plaintiff to pay the costs of the answer to, and all the costs occasioned by, his improper introduction of these charges into the bill.

Solicitors for the Plaintiff: Messrs. *Needham, Power, & Needham,* agents for Mr. *T. Hustwick, Soham.*

Solicitors for the Defendants: Messrs. *J. & C. Cole,* agents for Messrs. *Francis, Webster, & Riches, Cambridge.*

(1) 1 Hare, 15, 22.

V.-C. M.
1871
March 3.

In re LANGLEY MILL STEEL AND IRON WORKS COMPANY.

Company—Creditors' Petition—Discretion of Court—Wishes of Majority of Creditors—Companies Act, 1862, *s.* 91.

A winding-up order cannot be claimed *ex debito justitiæ* by an unpaid creditor of a company, and the Court will have regard to the wishes of the majority of the creditors; and may, under the *Companies Act*, 1862, s. 91, dismiss a creditor's Petition, though the debt has not been paid, where the majority of creditors desire a voluntary winding-up, and the Court is satisfied that that will be the preferable course.

10 Ch 619
WM 79/57 V C B.

THIS was a Petition to wind up the *Langley Mill Steel and Iron Works Company*, by persons who were creditors for £80, on a dishonoured acceptance by the company of the draft of *James Stephenson & Co.*, dated the 11th of January, 1869, payable six months after date, and consequently overdue. The Petitioners made a written demand on the company for payment on the 20th of July, 1869. The company had ceased to carry on business for more than a year, and was admitted to be insolvent.

The Petition was presented on the 3rd of February, 1871, and was in the paper for hearing on the 17th of February, but from the state of the business in the Court, did not come on to be heard on that day.

On the 14th of February, Mr. *W. C. Stoker*, one of the solicitors to the company, wrote to Mr. *Dixon*, the solicitor to the Petitioners, a letter which stated that the company owed nearly £20,000, independently of a mortgage debt, and that all the other creditors had been satisfied that it was not to their advantage to wind up the company, and had consented to await the result of a suit then pending, in which the company was interested, and which they hoped might result in bringing about a reconstruction of the company. The letter then stated that the mortgagees had given notice of sale under their power, but the notice would not expire till after the suit referred to was determined, and that the uncalled capital would not pay the expenses of a compulsory winding-up, so that the creditors would get nothing, and the official liquidator

would only have enough to pay his law charges. It then continued: "The greater number by far of the shares have been fully paid up, and we are afraid that most of those who have not paid up are not very well able to pay. What we would propose to do is this, to call a meeting and resolve on a voluntary winding-up, which would be the cheapest, paying your own costs of the Petition out of the first assets. Perhaps you will let the Petition stand over for a week or a fortnight to consider this." The Petitioner, however, did not accede to this proposal.

On the 18th of February, Mr. *Stoker* sent to each of the creditors of the company a copy of the following statement, which he requested them to sign and return:—

"As creditors of the above company, we beg to state that we are opposed to a winding-up of this company compulsorily by order of the Court of Chancery, and prefer and desire that the company shall be wound up voluntarily by a liquidator or liquidators nominated and approved by the general body of the creditors, believing it would be greatly to the benefit of the creditors that the latter course should be adopted in preference to the former. We authorize you to state this to the Court, on behalf of," &c.

Creditors to the amount of nearly £8000 signed and returned this statement.

The directors then resolved to call a meeting of the company to pass an extraordinary resolution for a voluntary winding-up, and notices were accordingly sent for a meeting to be held for the 20th of February, 1871, and all the creditors whose debts exceeded £10 were also summoned for a meeting to be held at the same place, at an earlier hour, the same day. The meetings were held accordingly, and at the meeting of the creditors persons whose debts amounted to more than £10,500 passed resolutions expressing their preference for a voluntary over a compulsory winding-up, and no contrary view was expressed. At the meeting of the shareholders, the extraordinary resolution was duly passed. The Petitioners were summoned to the meeting of creditors, but were not present.

The Petition was again in the paper on the 24th of February, but was not reached. It now came on for hearing.

V.-C. M.

1871

In re LANGLEY MILL STEEL AND IRON WORKS COMPANY.

Mr. *Glasse*, Q.C., and Mr. *G. Murray*, for the Petitioners:—

The Petitioners are entitled to a winding-up order *ex debito justitiæ*, under sect. 145 of the *Companies Act*, 1862, their debt being unpaid, and the company not having carried on business for more than a year: *Re General Rolling Stock Company* (1); *In re International Contract Company* (2).

Mr. *Higgins*, for the company:—

Re General Rolling Stock Company is not an authority for making the order in all cases, and there is nothing in the facts there stated to shew that the creditors approving of the compulsory order were not numerous.

A similar contention was raised in *In re Brighton Hotel Company* (3), and the suggestion of the order being *ex debito justitiæ* was disposed of. In that case, as here, there were on one side the body of creditors and shareholders, and on the other a single creditor to a small amount, and it was held that the Court had, under sects. 91 and 149 of the *Companies Act*, full discretion as to making the order. The Petitioners having been offered their costs, are not entitled to insist upon a compulsory order: *In re Times Life Assurance and Guarantee Company* (4); *In re Imperial Guardian Life Assurance Society* (5).

Mr. *Glasse*, in reply:—

In the cases last referred to there was an offer to pay the debt, which distinguishes them from the present case. It is impossible to say that the winding-up resolutions are so regular that calls can be made upon them. A winding-up order is the creditor's only remedy, and the Court has no power to deprive him of it: *Bowes* v. *Hope Mutual Life Assurance Company* (6). The meeting of creditors or contributories, not having been called by the direction of the Court, cannot be acted upon: *In re National Savings Bank Association* (7). In *In re Brighton Hotel Company* the Petitioner was both a creditor and a shareholder; and, moreover, his

(1) 34 Beav. 314.
(2) 14 L. T. (N.S.) 726.
(3) Law Rep. 6 Eq. 339.
(4) Law Rep. 9 Eq. 382.
(5) Ibid. 447.
(6) 11 H. L. C. 389, 402.
(7) Law Rep. 1 Ch. 547. 12 Jur. N.S. 697

debt was ordered to be paid. A creditor is entitled either to payment of his debt or to a winding-up order. The Petitioners, however, would be content with a winding-up under supervision.

Sir R. Malins, V.C.:—

The Petitioners are the holders of a dishonoured bill accepted by the company, which fell due in 1869. Not having been paid, they exercised their undoubted right of petitioning for an order to wind up the company. The Petition having been presented, was in the paper for hearing on the 17th of February last. On the 14th of February, that is, three days previously, the solicitors of the company wrote a letter saying that the company owed more than £20,000, and had very small assets, and that it was not expedient to have the company wound up till the pending suit against it was determined, and proposing that a meeting should be called to pass a resolution for winding up voluntarily, and also offering to pay the costs of the Petition out of the first assets of the company, and suggesting that the Petition should stand over for the purpose of allowing the Petitioners to consider the proposal.

Considering that the Petition was upon a debt of £80 only, and that the other creditors, whose debts amounted to more than £20,000, concurred in the course proposed by the company's solicitors, I think the offer was so reasonable that it ought to have been accepted; and when it further appears that the Petitioners would have no chance of being paid in full under a winding-up order, the course they have taken is, in my view, still more unjustifiable. Mr. *Glasse* pressed the order, as being *ex debito justitiæ;* that is to say, that at the instance of one creditor, and against the wishes of all the other creditors, I am bound to make an order to wind up a company compulsorily, however unjust I may think that course to be.

In my opinion, that is not the true construction of the *Companies Act;* and so far from it being so, I find that, by sect. 91, the Court has power in all cases of winding-up to consider what is most for the interest of all parties, and to have regard to the wishes of the creditors as well as contributories. I am of opinion that the Court has, under that section, complete discretion in all cases of winding-up, and must exercise that discretion with reference to all the

V.-C. M. 1871 *In re* LANGLEY MILL STEEL AND IRON WORKS COMPANY.

surrounding circumstances. Therefore, notwithstanding the view so strongly pressed upon me by Mr. *Glasse*, I think I am not bound to make the order.

The question does not come before me for the first time. In *In re Brighton Hotel Company* (1) the same argument was strongly pressed upon me, but I thought I might properly exercise the powers conferred upon the Court by sect. 91 of the Act, and did so with, as I have always understood, the most beneficial results.

In questions between different creditors of the same company, regard must be had to the respective values of their debts, and to say that a single creditor is entitled as of right to a winding-up order, is to say that the law disregards the wishes of creditors altogether.

It is the general policy of the law that the wishes of a majority shall bind the minority; and I am of opinion that I am bound to regard the wishes of the majority of the creditors. I do not, however, propose to act upon sect. 149 of the Act, which I am rather inclined to think only applies to meetings called after a winding-up order has been made.

Now, what was the proposal made on behalf of the other creditors? It was simply to allow the Petition to stand over, to give time to consider the propriety of a voluntary winding-up. I think that was a most reasonable course, and that I ought not to give encouragement to every litigious person to ask for a compulsory order. [His Honour then discussed the facts relating to the meetings, and continued:—]

Since, by sect. 91 of the Act, I am called upon to have regard to the wishes of creditors, I should have directed a meeting to be held if one had not already taken place; and if no resolution had been passed, except that of the creditors, I should have left the parties to wind up the company for themselves. But if anything more was required for the guidance of the Court, it is supplied by the resolutions of the shareholders, passed subsequently to the meeting of the creditors.

The assets of the company can in no case pay more than a very small dividend on its debts; and I am satisfied in my own mind that these Petitioners have not an interest in the company worth

(1) Law Rep. 6 Eq. 339.

£20. I will, therefore, not lay down a rule which would give power to any litigious creditor or shareholder in a company to have a compulsory order to wind it up against the wishes of all the rest.

The proper order on the Petition will be to pay the costs of the Petitioners to the time when the offer was made to them.

Solicitors: Mr. *T. H. Dixon;* Messrs. *Risley & Stoker.*

V.-C. B.
1871
April 21, 25.

Post 40

ATTORNEY-GENERAL *v.* CLEMENTS.

Marriage Act (4, *Geo.* 4 c. 76), *s.* 23—*Minor—License—Misrepresentation by Husband—Forfeiture—Fund in Possession not ordered to be settled, but directed to be transferred into Court—Declaration of Trusts of Funds in Possession and Reversion.*

A husband procured his marriage with a minor to be solemnized by a license, contrary to the provisions of the *Marriage Act* of 1823, by falsely swearing to certain matters to which he was required by the Act personally to swear, he wilfully and knowingly so swearing, and thereby incurred a forfeiture of all such estate, right, title, and interest as should then have accrued, or should thereafter accrue to him by force of the marriage. Immediately before the marriage, the wife was entitled absolutely to a sum of stock outstanding in trustees, and she was also entitled to certain reversionary interests in stock expectant on the death of her mother.

The fund in possession being small, the Court, instead of ordering a settlement, after declaring the forfeiture, directed the trustees to transfer the residue of the fund into Court, and declared the trusts.

Form of order, declaring trusts of the funds both in possession and reversion.

THIS information was filed by the Attorney-General on the 12th of December, 1870, at the relation of *Eliza Selby*, residing at No. 9, *Albert Terrace, Albert Square, Clapham Road, Surrey*, widow, against *Allen Clements* and *Eliza Alice*, his wife, and *William Turnbull* and *William Kelvington Jackson*.

The Defendant *Eliza Alice Clements* was the only daughter of the relator, and was born on the 10th of August, 1850. On the 7th of November, 1870, she eloped from her mother's house, where she was then residing, and on the 9th of November was married to the Defendant *Allen Clements* at the church of the parish of *St. Ethelburga-within-Bishopsgate*, in the city of *London*.

The marriage was solemnized by a license, which was obtained by *Allen Clements* from the surrogate of the Bishop of *London* on the 8th of November. In applying for such license, *Clements* falsely represented *Eliza Alice Selby* to be of the parish of *St. Ethelburga*, and of the age of twenty-one years and upwards: and he made oath (in the terms prescribed by the 14th section of the 4 Geo. 4, c. 76)

that he believed there was no impediment of kindred or alliance, or any other cause, to bar or hinder the proceeding of the matrimony according to the terms of the license; and that he had, for fifteen days preceding, had his usual place of abode in the same parish of *St. Ethelburga.*

The information alleged that the relator was the proper person to give her consent to the marriage; that she did not give such consent; that the marriage was celebrated without such consent, as *Allen Clements* well knew; and that he also well knew that *Eliza Alice Clements* was under twenty-one; and further, that *Allen Clements,* previously to, and after the time of applying for the license, had his usual place of abode at a certain street in *Bloomsbury.*

The information then (following the language of the 23rd section of the statute), charged that, under these circumstances, the marriage was procured by *Clements* contrary to the provisions of the 4 Geo. 4, c. 76, by means of his falsely swearing to the matters above-mentioned, wilfully and knowingly so swearing; and that *Allen Clements* had thereby forfeited all estate, right, title, and interest in any property of *Eliza Ann Clements* accruing to him by force of the marriage (1).

(1) The portions of sect. 23 of the 4 Geo. 4, c. 76, which were applicable to the present case, are as follows:—

"If any valid marriage solemnized by license shall . . . be procured by a party to such marriage, to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, contrary to the provisions of this Act, by means of such party falsely swearing as to any matter or matters to which such party is hereinbefore required personally to swear, such party wilfully and knowingly so swearing . . . then and in every such case it shall be lawful for His Majesty's Attorney-General . . . by information . . . in the Court of Chancery . . . at the relation of a parent or guardian of the minor, whose consent has not been given to such marriage, and who shall be responsible for any costs incurred in such suit, such parent or guardian previously making oath as is hereinafter required, to sue for a forfeiture of all estate, right, title, and interest in any property which hath accrued, or shall accrue to the party so offending, by force of such marriage; and such Court shall have power in such suit to declare such forfeiture, and thereupon to order and direct that all such estate, right, title, and interest in any property as shall then have accrued, or shall thereafter accrue to such offending party, by force of such marriage, shall be secured under the direction of such Court for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the said Court shall think fit, for the purpose of pre-

V.-C. B.
1871
ATTORNEY-GENERAL v. CLEMENTS.

It stated that *Eliza Alice Clements* was, previously to and at the time of her marriage, absolutely entitled, under a will, to £795 16*s.* 4*d.* stock standing in the names of the Defendants *Turnbull* and *Jackson* as trustees; and that she was or would be entitled, upon the death of her mother, the relator, to certain shares or interests in other funds and securities.

The information prayed for a declaration that all estate, right, title, or interest in or to the £795 16*s.* 4*d.* stock, and all such estate, right, title, and interest as might have accrued, or should thereafter accrue, to the Defendant *Allen Clements* by force of the said marriage between himself and the said *Eliza Alice Clements* had been forfeited by him; that proper directions and inquiries might be given and made for the purpose of ascertaining the property of the Defendant *Eliza Alice Clements*, and for a proper settlement thereof for the benefit of her, to the exclusion of the Defendant *Allen Clements*, and for the benefit of the issue, if any, of such marriage; for a receiver; for an injunction; to restrain the Defendants *Turnbull* and *Jackson*, in the meantime, from dealing with the fund; and for further relief.

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venting the offending party from deriving any interest in real or personal estate, or pecuniary benefits from such marriage . . ."

Sect. 14 requires that, "for avoiding all fraud and collusion in obtaining of licenses for marriage, that before any license be granted, one of the parties shall personally swear before the surrogate or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical Court, to bar or hinder the proceeding of the said matrimony, according to the tenor of the said license; and that one of the said parties hath, for the space of fifteen days immediately preceding such license, had his or her usual place of abode within the parish . . . within which such marriage is to be solemnized; and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of this Act has been obtained thereto . . ."

Sect. 16 enacts, that "the father, if living, of any party under twenty-one years of age, such parties (*sic*) not being a widower or widow, or, if the father shall be dead, the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried . . . shall have authority to give consent; and such consent is hereby required for the marriage of such party under age . . ."

On the 2nd of February, 1871, the Defendants *Turnbull* and *Jackson* answered as to the fund in their hands; and on the 10th of March the Defendant *Allen Clements* answered, not denying any of the allegations in the information, and submitting to the charges.

The above stated facts having been proved, the cause now came on upon motion for decree.

Mr. *Tripp*, for the relator:—

The forfeiture is admitted; the only question is as to the form of the settlement.

Mr. *Leonard*, for the husband.

Mr. *Sandys*, for the wife:—

The parties being in needy circumstances, the Court is asked to allow a small sum to be paid at once, out of the proceeds of a sale of part of the fund, to the wife's brother, who is her guardian *ad litem*.

SIR JAMES BACON, V.C.:—

The expense of a settlement should, if possible, be avoided; but if I am asked to make an order, I am not satisfied with the general allegation respecting the wife's reversionary interests. If that vague statement could be reduced to something like certainty, I might make an order, and thus save the parties the expense of a conveyance.

April 25. The cause came on again on an affidavit by the relator as to the particulars of the funds; and minutes of an order were submitted to the Court.

Mr. *Tripp*, on the form of the order, referred to *Attorney-General* v. *Lucas* (1), and other cases collected in *Seton* on Decrees (2).

The VICE-CHANCELLOR made an order in the terms given below. His Honour said it was with the greatest reluctance that

(1) 2 Ph. 753. (2) 3rd Ed. p. 734.

V.-C. B. 1871 ATTORNEY-GENERAL v. CLEMENTS.

he allowed any portion of the fund to be paid out to the guardian of the wife, knowing that such payment would practically be for the benefit of the husband, whose conduct had disentitled him to any favourable consideration. The sum of £150, which had been asked for, was preposterous; but His Honour would allow £50 to be paid.

An order was then made, of which the following are minutes:—

Declare that under the Act of Parliament made and passed . . . . (describing it), the Defendant *Allen Clements* has incurred a forfeiture of all estate, right, title, and interest in and to any property which has accrued or shall accrue to him by force of his marriage with the infant Defendant *Eliza Alice Clements*; and decree accordingly.

Declare that the £795 16*s.* 4*d.* Bank 3 per Cent. Annuities mentioned in the 11th paragraph of the information, and the moiety of and in the three several sums to which the said *Eliza Alice Clements* is entitled in reversion expectant on her mother's decease of £617 4*s.* 3*d.* standing in the New 3 per Cent. Bank Annuities, £56 4*s.* 4*d.* stock in the 3 per Cent. Consolidated Bank Annuities, and £1955 0*s.* 9*d.* in the 3 per Cent. Reduced Annuities, subject to the trusts of the indenture of settlement dated the 3rd of September, 1847, as mentioned in the 5th paragraph of relator's affidavit, sworn and filed in this suit on the 24th of April, 1871; and all such other property as now has accrued, or shall hereafter accrue, to the Defendant *Allen Clements* by virtue of his marriage with the said *Eliza Alice Clements*, and all the estate, right, title, and interest of the Defendant *Allen Clements* therein, shall be settled and secured for the benefit of the said *Eliza Alice Clements* and her issue respectively, in manner hereinafter directed.

Direct taxation of costs as between solicitor and client of all parties (except the Defendant *Allen Clements*) including in the costs of the relator any costs, charges, and expenses properly incurred by her of and incidental to the information, and also the costs incurred by her on the application for a guardian and maintenance prior to the information, and including in the costs of the Defendants *Turnbull* and *Jackson* any charges and expenses properly incurred in relation to the trust fund.

And this Court doth order and direct that the Defendants *Turnbull* and *Jackson* do, by a sale of a sufficient part of the sum of £795 16*s.* 4*d.* Bank 3 per Cent. Annuities, raise the sum of £50, and pay the same, together with the sum of £11 14*s.* 9*d.* cash in their hands, in respect of the dividend which accrued due on the 5th of January, 1871, in respect of the said Bank Annuities, to *James Selby*, the guardian *ad litem* of the said *Eliza Alice Clements*, to be applied for her sole and separate use, and upon her sole and separate receipt.

Let the Defendants *Turnbull* and *Jackson* sell so much of the residue of the said £795 16*s.* 4*d.* Bank 3 per Cent. Annuities, after raising the said sum of £50 cash, as will raise the total amount of costs, and costs, charges, and expenses as aforesaid, to be certified by the Taxing-Master.

Direct payment by the Defendants *Turnbull* and *Jackson* of the several amounts

of the costs, and costs, charges, and expenses to the respective solicitors of the relator and Defendants, except the Defendant *Allen Clements* as aforesaid.

Let the Defendants *Turnbull* and *Jackson* transfer the residue of the said £795 16*s.* 4*d.* Bank 3 per Cent. Annuities, after raising the said sum of £50, and the amount of the costs, and costs, charges, and expenses, such residue to be verified by affidavit, into the name of the Accountant-General, in trust in this cause, to be carried to an account to be entitled, "The Account of the Settlement of *Eliza Alice Clements*, wife of the Defendant *Allen Clements*."

Declare that such residue of the said £795 16*s.* 4*d.* Bank 3 per Cent. Annuities, when carried over, is to be held in trust for the said *Eliza Alice Clements* during her life, but during her coverture for her separate use, without power of anticipation, the dividends to be paid to her upon her sole receipt; and order the same accordingly. Subject as aforesaid, the said trust fund, after the decease of the said *Eliza Alice Clements*, shall be held in trust for all or such one or more of the children of the said *Eliza Alice Clements* as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or previously marry, in equal shares as tenants in common; and if there shall be no such child, and the Defendant *Eliza Alice Clements* shall survive the Defendant *Allen Clements*, in trust for her, her executors, administrators, and assigns. But if she shall die in the lifetime of her said husband without any such child, then the same shall be held in trust for such person or persons, other than the said *Allen Clements*, as the said *Eliza Alice Clements*, whether covert or sole, shall by her will appoint; and in default of any appointment, to such person or persons as would at the time of her decease have been entitled to her personal estate in case she had died intestate and without ever having married.

And as to the moiety or other interest to which the said *Eliza Alice Clements*, or the said *Allen Clements*, is, or but for the forfeiture hereinbefore declared would be, entitled in reversion expectant on her mother's decease of and in the said several sums of £617 4*s.* 3*d.* 3 per Cent. Bank Annuities, £56 4*s.* 4*d.* 3 per Cent. Consolidated Bank Annuities, and £1955 0*s.* 9*d.* 3 per Cent. Reduced Bank Annuities, which are subject to the trusts of the said indenture of settlement of the 3rd of September, 1847, before referred to (and subject to her mother's life interest therein), and also as to any other property which may hereinafter accrue to the said *Eliza Alice Clements*, or to the Defendant *Allen Clements* in her right: declare that the same shall be held and settled upon the like trusts to those hereinbefore declared with respect to the residue of the said £795 16*s.* 4*d.* Bank Annuities so directed to be transferred into the name of the Accountant-General as aforesaid.

Liberty to apply. *See Reg. Lib. 25 April 1871 A. 1045 V.C.B.*

Solicitor for the Relator and first two Defendants: Mr. *Edward Starling.*

Solicitor for the Trustees: Mr. *George Knox*, agent for Mr. *S. Sanderson, Berwick-upon-Tweed.*

V.-C. B.

1871

April 25, 29.

ATTORNEY-GENERAL *v.* READ.

Marriage Act (4 *Geo.* 4, *c.* 76), *s.* 23—*Minor—License—Misrepresentation by Husband—Forfeiture—Form of Settlement.*

In cases of forfeiture under the *Marriage Act,* 1823, where the property of a female minor is settled by the Court, the proper form of limitation comprises a general power to the wife of appointment by will, in default of children, without words to exclude the husband.

Attorney-General v. *Lucas* (1) followed.

Orders under the *Marriage Act* as to settlements ought not to be made without the Attorney-General appearing separately from the relator.

PETITION.

On the 23rd of October, 1869, an information was filed by the Attorney-General, at the relation of the Rev. *Philip Parker Gilbert*, Vicar of *St. Giles-without-Cripplegate*, against *Miles Read*, alleging as follows:—

On the 15th of July, 1869, the Defendant *Read*, of the parish of *Holy Trinity, Gray's Inn Road, Middlesex*, was married by license at *Trinity Church, Gray's Inn Road*, to *Elizabeth Henrietta*, daughter of the relator. The license was obtained on an affidavit made by the Defendant "that he believed that there was no impediment of kindred, or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of said matrimony according to the tenor of such license."

At the time when *Read* swore this affidavit, *Elizabeth Henrietta* was under age, and the information alleged that the Defendant well knew this fact, and also the fact that the relator had refused his consent to her marriage with *Read.*

The information then stated that Mrs. *Read* was entitled to a share in a sum of £7000, subject to her mother's life interest therein, "and is or may become entitled to other property and effects;" and prayed for a declaration of forfeiture under the 4 Geo. 4, c. 76; for an inquiry as to what property Mrs. *Read* was entitled to at the time of her marriage, or had since acquired; and that such property, and all future property which she should acquire

(1) 2 Ph. 753.

during the marriage, might be secured for the benefit of her and her issue, and that for that purpose a proper settlement might be approved by the Judge of all such property on Mrs. *Read* and her issue, and in such manner as that the Defendant *Read* should "be prevented from deriving any interest in any real or personal estate, or any pecuniary benefit, from such marriage;" and that the settlement might be ordered to be executed by such persons as the Judge should direct.

The Defendant *Read* filed an answer, in which he said: "Our engagement [to be married] was known to the informant . . . . and did not meet with his approval. Shortly before July, 1860, I received a communication from my wife, stating that her father was about to send her away from her home for ever. In consequence of this . . . . my wife and I determined to be married at once, and with that object I proceeded to obtain a license. I had not the slightest idea that my wife was then under age. She looked somewhat older than her years . . . . She never told me what her age was . . . . I firmly believed that she was of full age, and that there was no legal impediment whatever to our marriage. She is, in fact, in her twenty-first year . . . . I admit that such marriage was without his [the relator's] consent and in direct opposition to his wishes . . . . I am willing that whatever property the said *E. H. Gilbert* may be entitled to should be settled upon her for life, with remainder to myself for life, with remainder to the issue of the said marriage; and should there be no such issue, then with remainder to her own next of kin."

On the 7th of March, 1871, a Petition was presented by the relator, stating as above, and the filing of the information alleging and praying as above, and the answer; that the information had never been brought to a hearing; and that the Petitioner and Defendant had laid before the Attorney-General proposals to compromise the information on the terms—first, that the Defendant should assign to trustees the one-fourth of the fund, upon trust to invest and pay the income to the wife for her separate use, without anticipation, for her life, remainder to the children of the marriage, as the wife should appoint; in default, for the children equally at twenty-one or marriage, and in default of children, to stand possessed of the fund, "in trust for such persons as the said *E. H. Read*

V.-C. B. 1871

ATTORNEY-GENERAL v. READ.

should by will appoint;" and in default, for the next of kin of the wife, as if she had died unmarried and intestate; and, secondly, that this Petition should be presented.

The Petitioner then stated that the Attorney-General had consented to such proposals being carried out; and prayed that, on production of an engrossment of the "said" draft settlement duly executed by the Defendant *Read*, the information might be dismissed without costs.

Mr. *Fischer*, for the Petitioner.

Mr. *Robinson*, for the Respondent, the Defendant *Read*.

The VICE-CHANCELLOR objected that the general power of appointment in the draft settlement, in default of issue, did not exclude the husband, and directed the Petition to stand over to have the point considered.

April 29. Upon the Petition coming on again,

Mr. *Fischer*, for the Petitioner, referred to *Attorney-General* v. *Lucas* (1), where the power of appointment to the wife was not exclusive of the husband.

Mr. *Robinson*, for the Respondent *Read*.

Mr. *Hemming*, for the Attorney-General:—

The usual practice in cases where the Attorney-General has appeared separately has been in conformity with *Attorney-General* v. *Lucas*; but some want of uniformity has occurred in other cases.

SIR JAMES BACON, V.C.:—

I feel bound to follow the decision in *Attorney-General* v. *Lucas*, although I do so with great reluctance, considering, as I did in *Attorney-General* v. *Clements* (2), that that decision is contrary to the spirit and intention of the framers of the Act of Parliament.

(1) 2 Ph. 753. (2) *Ante*, p. 32.

V.-C. B.
1871
ATTORNEY-GENERAL v. READ.

[His Honour intimated that in future he should not make an order in any of these cases, except in the presence of the Attorney-General.]

An order was made, of which the following are minutes:—

By consent, treat this as the hearing of the information.
Declare the forfeiture.
Direct a settlement to be prepared in the form stated in the Petition.
Direct the costs of the Attorney-General to be paid by the relator; the relator's costs, including the above, to be paid by the Defendant.

Solicitors for the Relator: Messrs. *Baylis & Son.*
Solicitors for the Treasury: Messrs. *Raven & Bradley.*
Solicitors for the Defendant *Read*: Messrs. *Combe & Wainwright.*

PEARS *v.* LAING.

V.-C. P.
1871
Jan 11, 12, 13; Feb. 11.

Mortgage—Covenant for Payment—Suit against Devisees—Statutes of Limitation—3 & 4 Will. 4, c. 27—3 & 4 Will. 4, c. 42—Payment of Interest—Acknowledgment.

In 1822 *A.* mortgaged part of his *V.* estate and some renewable leaseholds to secure £1000, and the deed contained the usual covenant by *A.*, for himself, his heirs, executors, and administrators, for payment of principal and interest. *A.* died in 1825, having by his will devised to *B.*, his son, and *C.* his *X.* estate, in trust for his daughters *D.* and *E.* for life, with remainder (in the events which happened) to his other children, and the whole of his *V.* estate to the same trustees in trust for his daughter *F.* for life, with remainder to her children. The trustees were empowered to sell both estates, and apply the proceeds upon the trusts declared of the same; and the will contained a devise to the same trustees of his other real estates, the renewable leaseholds, and his personal estate, upon trust to sell and apply the proceeds in payment of legacies and the mortgages on *V.* and *X.* estates, and his other debts, the general residue being given to *B.*

B. died in 1830, having by will given all his estate to his sisters *D.* and *E.*, and appointed them his executrixes. In 1831 mortgages affecting *X.* estate, and the part of *V.* estate not comprised in the mortgage of 1822, were paid off out of *A.'s* general estate, and reconveyances were executed to *C.* as surviving trustee of his will. *D.* received the rents of a moiety of *X.* estate, and paid interest on the mortgage of 1822 until her death in 1859.

In 1864 *G.*, who had by representation become the surviving trustee of *A.'s* will, and as such, trustee for the persons beneficially interested, of the equity of redemption of the property comprised in the mortgage of 1822,

V.-C. B.
1871
PEARS
v.
LAING.

sold the renewable leaseholds, and applied the purchase-money in discharging the arrears of interest due on that mortgage, and in satisfaction, *pro tanto*, of the principal. In a creditors' suit instituted in 1867 by the administrator of the transferee of the mortgage of 1822 for an account, sale of the mortgaged property, and, in case the money to arise by the sale should be insufficient, that the deficiency might be made good out of the assets of *A.*:—

Held, that the claim was not barred by the *Statutes of Limitation* (3 & 4 Will. 4, c. 27; 3 & 4 Will. 4, c. 42), as, independently of the application of the proceeds of the sale in 1864 in satisfaction *pro tanto* of the debt and interest, the payment of interest by *D.* until her death in 1859 was binding upon all persons interested either in the mortgaged property or in the other property of *A.*, which was liable, by reason of the covenant, for repayment of interest, and kept the specialty alive against them.

Roddam v. *Morley* (1) approved, notwithstanding the observations upon it in *Coope* v. *Cresswell* (2).

THIS was a bill by the Plaintiff and all other the creditors of Sir *Cuthbert Heron*, deceased, praying an account of what was due to the Plaintiff as administrator of the transferee of a mortgage created by Sir *Cuthbert Heron* in 1822, and consequential relief.

By indenture dated the 26th of June, 1822, in consideration of £1000, Sir *Cuthbert Heron* conveyed by way of mortgage to *George Townsend Fox*, his heirs and assigns, a parcel of land called the *West Pasture*, and also one undivided fourth part of a farm called *Viewly Hill*; and the deed contained a covenant by Sir *C. Heron*, for himself, his heirs, executors, and administrators, with *Fox*, his executors, administrators, and assigns, for payment of the £1000, with interest thereon at 5 per cent. By another indenture of the same date, Sir *C. Heron* assigned certain houses in *South Shields*, which were held under a renewable lease for years from the Dean and Chapter of *Durham* (and have since been sold), to *Fox*, his executors, administrators, and assigns, for the then existing interest therein of Sir *C. Heron*, subject to the lessee's obligations, and to redemption on payment of the above-mentioned sum of £1000 and interest.

By his will, dated the 1st of September, 1824, Sir *C. Heron* devised unto *James Archbold* and his (the testator's) son *Thomas Heron* (whom he also appointed his executors) all his freehold estate called *Newby Grange*, and all his freehold estate called

(1) 1 De G. & J. 1. (2) Law Rep. 2 Ch. 112.

Viewly Hill, to hold unto *Archbold* and *Thomas Heron*, their heirs and assigns, in trust, as to *Newby Grange*, for the use of *Ann* and *Margaret Heron*, in equal moieties, for and during the term of their natural lives, and from and immediately after their respective decease, in trust for their respective children in equal shares at twenty-one; but in the event (which happened) of their both dying without issue, in trust for the use of his children or their representatives, as if personal estate. As to *Viewly Hill* estate, in trust for the sole and separate use of his daughter *Sarah Laing* for life, and after her death for the use of all her children, share and share alike, their respective shares to be vested at and when they should respectively attain twenty-one. And he gave his trustees power, with the consent of his son *Thomas*, to sell both estates, and invest the proceeds, and to hold them upon the trusts declared of the same estates respectively. He also devised all other his real estates and his leaseholds held under the Chapter of *Durham*, and all his personal estates, to the same trustees, upon trust to sell, with a direction to apply the proceeds in payment of his funeral expenses and pecuniary legacies, and all such sums as were then secured by way of mortgage on *Newby Grange*, and *Viewly Hill* (it being his intention that these estates should go to the several persons for whose benefit the before-mentioned devises had been made, clear of all incumbrances then affecting the same), and in payment of all other his just debts. He then directed the investment of a sum of £2600, to be held in trust for the children of his deceased daughter *Jane Rennoldson* (with certain provisions as to vesting not material for this report), and as to the rest and residue of the money to arise by such sale, or so much of his real and personal estate as should not be sold, the same was to be in trust for the sole use and benefit of his son *Thomas*, his heirs, executors, administrators, and assigns respectively.

The testator died a widower in May, 1825, and his will was shortly afterwards proved by his executors. At the testator's death, his son, Sir *Thomas Heron*, was his only son and heir-at-law. The testator also left him surviving his three daughters, *Ann*, *Margaret*, and *Sarah* (Mrs. *Laing*), and eight grandchildren, children of his deceased daughter Mrs. *Rennoldson*.

V.-C. B. 1871 PEARS v. LAING.

At the death of the testator, Sir *C. Heron*, three-fourths of the *Viewly Hill* estate (other than the one-fourth comprised in the mortgage of 1822) and the *Newby Grange* estate were subject to certain mortgages. In 1831 these mortgages were paid off out of the proceeds of Sir *C. Heron's* general estate, and the estates were reconveyed to *James Archbold* as surviving trustee of Sir *C. Heron's* will.

Sir *T. Heron* died in 1830, having by his will given all his estates to his sisters *Ann* and *Margaret Heron*, as tenants in common, and appointed them executrixes of his will.

Ann died unmarried in 1859, having by a will, which was never proved, appointed *Margaret* her executrix. *Margaret* died unmarried and intestate in 1863.

The mortgages of 1822 had been from time to time transferred, and ultimately, in 1842, they became vested in *Frances Archbold*, who died unmarried and intestate in February, 1844, leaving her brother, the said *James Archbold* (at that time, by the death of Sir *Thomas Heron*, on the 28th of October, 1830, sole surviving trustee of the will of Sir *Cuthbert Heron*), her heir-at-law, and *James Archbold* and her sister *Jane Archbold* her sole next of kin.

On the 2nd of January, 1849, *James Archbold* died a bachelor and intestate as to real estate, leaving his sister *Jane* his heiress-at-law and sole next of kin, and also the heiress-at-law of *Frances Archbold* (in whom the legal estate in the mortgaged premises had become vested). The will of *James Archbold*, made in 1832, though inoperative from want of due attestation as to real estate, bequeathed all his personal estate to his sisters *Jane*, who survived him, and *Frances*, who died in his lifetime; and the will was proved by his executors, *George Bownas* and *John Gibson*.

Jane Archbold died on the 9th of June, 1852, having by her will, dated the 1st of November, 1851, bequeathed the residue of her personal estate to *William Pears*, the Plaintiff, in trust for his son, an infant. She also devised and bequeathed all the estates vested in her on any trusts, or by way of mortgage, and which she had power to dispose of, to *William Dunn*, *Joseph Crawhall*, the said *George Bownas* and *John Gibson*, their heirs, executors, adminis-

trators, and assigns, according to the nature and quality thereof respectively, upon trust to hold or dispose of the said trust estates in the manner in which they ought to be held or disposed of pursuant to the said trusts, and upon payment of the moneys secured on mortgage, to convey or assign the estates in mortgage to the person or persons entitled thereto, with a direction that the money secured upon such mortgages should be considered and taken as part of her personal estate.

Of the four therein named, *William Dunn* was the last surviving devisee in trust of mortgage estates, and executor under *Jane Archbold's* will. *William Dunn* died on the 9th of September, 1862, having by his will, dated the 16th of January, 1848, devised unto his brother, the Defendant *George Dunn* (his executor), all estates vested in him as trustee or mortgagee.

The lease of the leasehold premises comprised in the security of 1822, after having been renewed from time to time, was ultimately renewed by lease of September, 1853, to *William Dunn*, *George Bownas*, and *John Gibson*, executors of *Jane Archbold*.

On the 2nd of May, 1855, administration, with the will annexed, was granted to Plaintiff, *William Pears*, of the goods and effects of *James Archbold* left unadministered by *John Gibson* and *George Bownas;* and on the 19th of January, 1867, administration to *Frances Archbold* was also granted to Plaintiff. It appeared that interest on the mortgage of 1822 was duly paid to the executors of *Jane Archbold*, and to the executors of *James Archbold*, by or on behalf of *Ann Heron*, as devisee under the will of Sir *Cuthbert Heron*, down to the 1st of February, 1859. *Ann Heron* died on the 12th of June, 1859, having by will, which remained unproved, appointed her sister *Margaret* her sole executrix.

Margaret Heron died on the 2nd of June, 1863, a spinster, and intestate. It appeared that since February, 1859, payments had been made in respect of interest by a Mr. *Wardle*, who was appointed by *Ann* and *Margaret Heron* to collect the rents of the leaseholds at *South Shields*.

With respect to the *West Pasture*, as to which, though comprised in the mortgage of 1822, no relief was prayed in the present suit, it appeared that it had been included by inadvertence in a conveyance of other adjoining property to a purchaser for value in 1829,

V.-C. B. 1871 PEARS v. LAING.

without notice of the mortgage, and had been dealt with on that footing ever since.

By indenture of the 8th of September, 1859, a settlement was made of the share of *Sarah Laing* in the *Newby Grange* estate to *William Lockey Harle*, as a trustee upon certain trusts for the benefit of Mr. and Mrs. *Laing* during their lives, and after the determination of such trusts, upon trust to sell and divide the proceeds among the children of Mr. and Mrs. *Laing* (one of whom was the wife of *Harle*).

By virtue of that settlement, *William Lockey Harle* became a trustee of the interests of the *Laing* children in the equity of redemption of the *Newby Grange* estate, and by their answer Mr. and Mrs. *Harle* submitted that, upon the deaths of *Ann* and *Margaret Heron* without issue, and without having done any act to bar the estates tail in remainder, such estates took effect in favour of the other children of the testator living at his death, viz., Sir *Thomas Heron*, *Sarah Laing*, and the children of *Jane Rennoldson* (taking their mother's share).

On the 29th of September, 1864, *George Dunn*, having been called upon to realise the mortgage security of the 26th of June, 1822, caused the leaseholds at *South Shields* to be sold, and *Francis Reay* became the purchaser of them for £300. This sum of £300 realised by the sale was applied by *George Dunn* in discharge of the costs of the sale and assignment, and other expenses, and of an arrear of interest remaining due on the security of the mortgage, and in discharge of £58 8*s.* 4*d.* on account of the mortgage debt of £1000. The bill alleged, and the answer of *George Dunn* stated, that the sale was made at the request, and with the full concurrence, of the Defendant, *William Lockey Harle*, who was acting in the said matter on behalf of himself and all persons beneficially interested under the will of Sir *Cuthbert Heron*.

Previously to this sale a Mr. *Dees*, as the solicitor of *George Dunn*, applied to *Harle* to ascertain whether the persons interested under Sir *C. Heron's* will were willing to pay off the mortgage, or concur in any arrangement for realising it. A long correspondence, extending from 1863 to 1866, relating not only to the sale, but also to some proposed arrangement, took place between *Dees* and *Harle*, and also between *Dees* and *Heath*, the trustee for the

Rennoldson family, and executor of one of them; and in the course of that correspondence both *Heath* and *Harle* frequently admitted the existence of the mortgage and the liability of Sir *C. Heron's* estate to repay the same. In a letter of the 2nd of December, 1865, *Harle* wrote to *Dees:* "I passed by Mr. *Heath* altogether, and wrote to three of the *Rennoldson* ladies. I explained the matter fully to them, and added that if the five would allow me to deduct £250 from the sale moneys of *Newby Grange*, I would pay you off;" and in a letter of the 18th of November, 1865, *Heath* wrote to *Dees:* "Interested to a small extent as an executor in the estate of the mortgagor, I am quite willing to concur in the payment of the balance of the mortgage debt out of that estate on having an effectual reconveyance of the mortgaged property."

No arrangement having been come to, and the sum of £941, with an arrear of interest remaining due upon the mortgage of the 26th of June, 1822, the Plaintiff, as the administrator of *Frances Archbold*, claiming the amount due for principal and interest upon the security of the mortgage, and also as a mortgagor under the covenant of Sir *C. Heron*, contained in the mortgage deed, had, on the 5th of February, 1867, filed his bill (on behalf of himself and all other the creditors of Sir *C. Heron*), against the *Laing* family, Mr. and Mrs. *Harle* (*Ann Laing*), the *Rennoldson* family, and Mr. *J. C. Heath*, their trustee, and *George Dunn*, in whom, subject to the trusts of the will of Sir *C. Heron*, the equity of redemption of the premises comprised in the mortgage was vested, praying, first, an account of what was due to Plaintiff as administrator of *Frances Archbold*, the last transferee of the mortgage, for principal and interest, costs, charges, and expenses upon the mortgage security, and for the costs of the suit; secondly, a sale of the one-fourth of the *Viewly Hill* estate comprised in the mortgage, and application of the proceeds of what should be found due on taking the account; thirdly, a declaration that Plaintiff was entitled to receive satisfaction for any deficiency to arise by such sale, to pay the amount found due upon taking the account, out of the assets of Sir *C. Heron*, the mortgagor, in a due course of administration. Consequential relief upon the above footing was also prayed.

The defence raised was, that the claim of the Plaintiff for any sum of money as remaining due to him for principal and interest

V.-C. B. 1871 PEARS v. LAING.

on the mortgage was barred by the *Statute of Limitations* (3 & 4 Will. 4, c. 27); and as regarded the claim of Plaintiff to be a creditor under the covenant of Sir *Cuthbert Heron*, deceased, no acknowledgment in any way binding or affecting the Defendants as persons interested in Sir *C. Heron's* real estate not devised in trust for payment of his debts had ever been made in writing, signed by any party liable by virtue of such covenant, or his agent, or by payment, or part payment, or part satisfaction, on account of any principal or interest then due thereon within twenty years immediately preceding the commencement of the suit, and that under these circumstances Plaintiff's claim on the covenant was barred by 3 & 4 Will. 4, c. 42.

When the case was first brought on, on the 10th of November, 1868, it was objected that the suit was defective in the absence of any personal representative of Sir *C. Heron* and Sir *Thomas Heron*. The case was accordingly directed to stand over, with liberty to amend, and since that time the Plaintiff had obtained letters of administration of the personal estate and effects of Sir *Thomas* and of Sir *Cuthbert* limited to this suit, and was now their legal personal representative for the purposes of this suit.

Mr. *Kay*, Q.C., and Mr. *Marten*, for the Plaintiff:—

The original mortgagor, Sir *Cuthbert Heron*, being dead, the Plaintiff, who represents the interest of the mortgagee, is entitled to prove against the general assets of Sir *C. Heron* for the balance of the mortgage debt and interest: *Mason* v. *Bogg* (1). The only defence that is set up is the *Statute of Limitations*, but the case is clearly taken out of the statute by the payment of interest down to 1859 by *Ann* and *Margaret Heron*, who were in possession of *Newby Grange*, as volunteers claiming under the mortgagor. After the death of *Ann Heron* in 1859, interest continued to be paid by *Harle*, acting for all persons beneficially interested as agent for the receipt of the rents, and upon the sale of the leaseholds in 1864 the whole proceeds were applied in discharging the arrears of interest and satisfaction *pro tanto* of the principal remaining unpaid. It is not pretended that this sale and application of the

(1) 2 My. & Cr. 443.

proceeds were acts of the mortgagee, who was not in possession, or made adversely to the mortgagor. The payment by the devisees for life of interest on their testator's specialty debt is an acknowledgment made "by the party liable by virtue of such specialty" within the meaning of 3 & 4 Will. 4, c. 42, s. 5, and will keep the debt alive against and bind all persons in remainder: *Roddam* v. *Morley* (1). Even if *Ann* and *Margaret Heron* had been executors of the testator as well as beneficial devisees, the payment of interest could not have been attributed to the character of executor rather than of devisee: *Fordham* v. *Wallis* (2). Besides the payment of interest, the Defendants *Heath* and *Harle*, acting on behalf of all persons beneficially interested, have clearly recognised the mortgage debt as subsisting. The correspondence is conclusive upon this point, and contains no reference to the statute.

[They also cited *Newhouse* v. *Smith* (3).]

Mr. *Fry*, Q.C., and Mr. *Graham Hastings*, for the several Defendants, members of the *Laing* family:—

The claim of the Plaintiff is barred by the *Statute of Limitations*. The payments by *Ann* and *Margaret Heron*, who were devisees of the *Newby Grange* estate only, could not keep the mortgage debt alive against the owners of the other estates. As regards those other estates in the hands of the Defendants, such payments are not payments "by the party liable by virtue of such indenture, specialty, or recognisance, or his agent," within the meaning of 3 & 4 Will. 4, c. 42, s. 5, so as to prevent the operation of the statute: *Coope* v. *Cresswell* (4). An acknowledgment by one devisee does not prevent his co-devisee from pleading the statute: *Dickenson* v. *Teasdale* (5). And conversely, an acknowledgment by one only of two joint mortgagees will not entitle the mortgagor to redeem or save the operation of the statute: *Richardson* v. *Younge* (6). In *Roddam* v. *Morley* it was held by Vice-Chancellor *Wood*, that payment of interest within twenty years by the tenant for life of the obligor's real estate did not keep alive a right of action on the bond against persons entitled to such real estate in remainder;

(1) 1 De G. & J. 1.
(2) 10 Hare, 217.
(3) 2 Sm. & Giff. 344.
(4) Law Rep. 2 Ch. 112.
(5) 1 D. J. & S. 52.
(6) Law Rep. 10 Eq. 275.

BIBL. LONDIN

V.-C. B. 1871 PEARS v. LAING.

and though this decision was overruled (1), we submit that, after *Coope* v. *Cresswell* (2), the original rather than the ultimate decision represents the state of the law. According to that decision, payment by the personal representative of the testator and the devisee of estate *B.* will not keep the charge alive against the person upon whom estate *A.* has descended. Then by 3 & 4 Will. 4, c. 27, s. 40, it is provided that no action or suit shall be brought to recover any sum of money secured by any mortgage, but within twenty-one years next after the present right to recover the same shall have accrued, "unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent." But the requisites of the statute have not been complied with. Payments of interest made by a stranger to the contract would not have the characteristics and legal quality of payment: *Chinnery* v. *Evans* (3). The payments by the devisees of *Newby Grange* could not have the effect of keeping the mortgage on foot against the persons beneficially interested in *Viewly Hill*, nor could the payments made after 1859, being made by persons not liable to pay, and without authority from those who were liable. As to the sale of the leaseholds in 1864, and application of the proceeds by *Dunn*, which had been relied upon by Plaintiff, that could not bind the Defendants, as the payment was not made by a person liable—*Dunn* being a trustee for the estate of the person in whom the mortgage debt had become vested—nor to the person entitled, there being at that time no person capable of giving a discharge as the legal personal representative of *Frances Archbold*—no legal hand to receive. With respect to the alleged acknowledgments by *Harle*, the letters were written *alio intuitu*, not as admitting the debt, or to the person entitled to claim payment, but to *Dees* as the solicitor and agent of *George Dunn*, for the purpose of bringing about an arrangement. Even if binding upon *Harle* himself, they could not bind the persons taking the other eight-ninths of *Viewly Hill*, and did not amount to an acknowledgment

(1) 1 De G. & J. 449 (2) Law Rep. 2 Ch. 112, 125, 126.
(3) 11 H. L. C. 115, 133.

within 3 & 4 Will. 4, c. 27, s. 42: *Holland* v. *Clark* (1); *Grenfell* v. *Girdlestone* (2).

In addition to the bar to the Plaintiff's claim by the *Statute of Limitations*, the suit is defective for want of parties, as no one representing the heir of the original testator is before the Court; and under the *Statute of Fraudulent Devises* (3 & 4 Will. & M. c. 14), which governed this case, as the testator died in 1825, before 11 Geo. 4, and 1 Will. 4, c. 73, the action by a specialty creditor must be brought jointly against the heir and the devisee; "so that all the parties really interested in resisting the demand—the heir as to lands descended and the devisee as to lands devised—may have an opportunity of doing so:" *Roddam* v. *Morley* (3).

Mr. *Crossley*, for other members of the *Laing* family.

Mr. *Willcock*, Q.C., and Mr. *Faber*, for the *Rennoldson* family and *Heath*, contended that the Plaintiff's claim was barred by the statute from the absence of any acknowledgment within twenty years binding upon the Defendants; and that, even if there were an acknowledgment by the persons primarily liable, it would not affect the persons ultimately liable, if, as was the case here, their liability had been discharged by the *Statute of Limitations*: *Fordham* v. *Wallis* (4). The debt being once gone, it cannot be revived by a subsequent acknowledgment or promise to pay, "because the action in which the acknowledgment is to be operative must always be founded and maintained on the original obligation, and on that only:" *Roddam* v. *Morley* (5).

[They referred to the evidence and the correspondence in support of their contention that *Harle* had no authority from the *Rennoldsons*, and could not bind them; and, further, that the letters contained no distinct admission that interest had been paid. They also cited *Gregson* v. *Hindley* (6), and referred to 19 & 20 Vict. c. 97 (*Mercantile Law Amendment Act*), s. 14.]

Mr. *Eddis*, Q.C., and Mr. *Chitty*, for *Dunn*.

(1) 1 Y. & C. Ch. 151.
(2) 2 Y. & C. Ex. 662.
(3) 1 De G. & J. 1, 20.
(4) 10 Hare, 217.
(5) 1 De G. & J. 15.
(6) 10 Jur. 1135.

V.-C. B. 1871 PEARS v. LAING.

Mr. *Kay*, in reply, referred to *Moodie* v. *Bannister* (1); *Jackson* v. *Woolley* (2); *Forsyth* v. *Bristowe* (3).

Feb. 11. SIR JAMES BACON, V.C.:—

This is a creditors' suit instituted by Plaintiff on behalf of himself and the other creditors of Sir *Cuthbert Heron*, deceased. The Plaintiff claims to be entitled to a balance remaining unpaid of a debt of £1000 secured by a mortgage, and he seeks to enforce the mortgage by sale, and to have any deficiency made good out of the estate of Sir *C. Heron*. The Defendants, with one exception, are persons claiming to be beneficially interested in real estates devised by the will of Sir *C. Heron;* the only other Defendant, *George Dunn*, has vested in him the legal estate in the mortgaged premises, and also in the devised estates, of both which he is a trustee. The Defendants beneficially interested allege that the right to sue in respect of the mortgage, and also in respect of the covenant for payment contained in the mortgage deeds, are respectively barred by the *Statutes of Limitation*. The length of time which has elapsed since the debt in question was contracted, and the changes of interest in the several parties which have happened, render the statement of the case somewhat intricate. The main facts, however, appear to be these:—[His Honour, after stating the case, continued:—]

It is hard to see, under these circumstances, how the *Statutes of Limitation* can apply, and still more difficult to reconcile statements contained in the answers of some of the Defendants with the facts proved in evidence. For it is not only sufficiently proved that *Ann Heron*, who, up to the time of her death, was in the enjoyment of a moiety of *Newby Grange* under the trusts of the will of Sir *C. Heron*, and who was also interested under the will of her brother Sir *Thomas Heron*, with her sister Mrs. *Laing* and the children of a deceased sister, Mrs. *Rennoldson*, in the general residue of Sir *C. Heron's* real and personal estate, paid the interest on the mortgage debt down to 1859; but it is also proved that the circumstances of the sale were perfectly

(1) 4 Drew. 432. 5 Jur. N.S. 403. (2) 8 E. & B. 784. 4 Jur. N.S. 656. (3) 8 Ex. 716. 17 Jur. 675.

well known to persons who, whether they fully represented the parties in the enjoyment of Sir *C. Heron's* devised and other estates or not, did nevertheless take an active part in the several dealings which preceded and ensued upon the sale by *George Dunn*.

The correspondence is put in issue, and the Plaintiff insists that the letters of Mr. *Harle* and Mr. *Heath* contain acknowledgments by them respectively of the existence of the mortgage, and of the balance remaining unpaid. The Defendants dispute this, and allege that they neither made, nor were competent to make any such acknowledgment, and they both refer to the letters. [After reading the correspondence which, as His Honour stated, related on both sides to the mortgage debt, and took place between the person who was demanding payment and two of the persons by whom the debt, if payable, was to be paid, while nothing in the course of it was to be ascribed to a want of knowledge either of fact or law, His Honour continued :—]

Now, upon the somewhat complicated state of circumstances which I have gone through, the question arises whether the debt claimed by the Plaintiff, and which is most undoubtedly due, as nobody has affected to deny it, is by law capable of being recovered; the only defence suggested being that the law as it stands defeats and bars the claim. That question, which is not without difficulty, can only be determined by the express provisions of the statutes, and the construction which has been put upon them in the decided cases.

The policy of the *Statutes of Limitation* is obvious; and the terms in which that policy is carried into practical execution are open to no serious doubts, although those terms have not always escaped criticism. The policy is, that stale claims should be discouraged, and that a certain rule should be established instead of the doctrine of presumption, which had before prevailed. Thus the 3 & 4 Will 4, c. 27, s. 40, enacts that no suit shall be brought to recover any mortgage-money but within twenty years next after a present right to receive the same, shall have accrued to some person capable of giving a discharge for or release of the same. And equally peremptory is the enactment of sect. 3 of 3 & 4 Will. 4, c. 42, as to suits upon covenant, which must be brought within twenty years after the cause of such actions or suits arose, but not

V.-C. B. 1871 PEARS v. LAING.

after. But then follow provisions which were abundantly necessary in order to prevent the severe conciseness of the enactments referred to from being made the instruments of fraud. It is before provided in the one statute that the bar shall operate unless, in the meantime, some part of the principal or some interest thereon shall have been paid, or some acknowledgment of the right shall have been given in writing, signed by the person by whom the same be payable, or his agent, to the person entitled thereto or his agent. By the second statute (sect. 5) it is provided that, if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such specialty, or his agent, or by payment or part satisfaction on account of any principal or interest due thereon, the action may be brought within twenty years after such acknowledgment or payment. The phraseology in the two statutes is somewhat different. Neither of them states expressly by whom the payment is to be made; but it was held, in *Roddam* v. *Morley* (1), that it must be made by a party interested; and, as was said in *Tofts* v. *Stephenson* (2), it must mean the party who, unless he paid it, would lose his land. I am of opinion that the fact of payment of interest by *Ann Heron* up to 1859 is established. But then it is argued, on the part of the Defendants, that even if this were so, such payment could not keep the debts upon the covenant alive against any of the other persons interested in the testator's estate not expressly charged with the payment of his debts. And in support of this argument, reference is made to the case of payment made by a person who, being a debtor on his own personal liability, and also as executor of a co-debtor, made payment out of the estate of his testator, and which payment was held not to take the case out of the statute as regarded such payer's personal liability. And although, where the same person holds two perfectly distinct characters, it may be necessary to distinguish in which of the characters the payment was made, yet, as was held in *Fordham* v. *Wallis* (3), "what we have to consider in these cases is the act of the person and not the position of the estate, for the existence or non-existence of the demand depends upon the act of the person,

(1) 1 De G. & J. 1. (2) 1 D. M. & G. 40.
(3) 10 Hare, 228.

and not upon the relative liability of the property." Let us consider, then, what was the position of *Ann Heron*. She was one of the two *cestuis que trust* of the equity of redemption of *Newby Grange*, and that estate was not charged by the testator with the payment of his debts. She was also interested, under her brother Sir *Thomas Heron's* will, in all such interest as he took under Sir *C. Heron's* will, not only in the general residue of his real and personal estate which was charged with the payment of his debts, but in the reversionary interest in the *Newby Grange* estate upon the determination of the respective tenancies for life of *Ann* and *Margaret* without issue. Besides this, at the time up to which the interest on the mortgage debts was paid by *Ann Heron*, and long before, the mortgages upon *Newby Grange* and three-fourths of *Viewly Hill*, had been paid off by the trustees of Sir *C. Heron's* will out of his general estate, which was charged with the payment of all his debts. By means of this payment, the trustees had procured a reconveyance to themselves of the two mortgaged estates upon the trusts of Sir *C. Heron's* will. And this was effected by the payment of £3000 out of that general estate which was charged with the payment of all the debts. All this *Ann Heron* must be taken to have known; and it is, in my judgment, consistent with the principle, and well established by the decisions as well of *Roddam* v. *Morley* (1) as of *Chinnery* v. *Evans* (2), that *Ann Heron* was at this time one of the several persons interested in the general estate of the testator, as well as in a moiety of *Newby Grange*, which had been freed from the mortgages by the application of a part of that general estate. The payment of interest by *Ann Heron* cannot, I conceive, be ascribed to any other consideration than that by so doing she was postponing the payment of, but keeping alive, a debt which, if it had been enforced against her and the other persons entitled under the trusts of Sir *Cuthbert Heron's* will, must have been satisfied out of the beneficial interests taken by them all under that will.

The case of *Roddam* v. *Morley*, which (notwithstanding all that has been said of it in *Coope* v. *Cresswell* (3), or elsewhere), I conceive to be of unquestionable authority, has decided that payment

(1) 1 De G. & J. 1. (2) 11 H. L. C. 115.
(3) Law Rep. 2 Ch. 112.

V.-C. B. 1871 PEARS v. LAING.

of interest by the tenant for life of a devised estate keeps a specialty alive against the persons entitled in remainder. But the case is also of great value, by reason of the close and careful examination into the *Statutes of Limitation*, as well by the Common Law Judges, whose assistance was procured by the Lord Chancellor, as by Lord *Cranworth* himself. The Judges pointed out that the action to be brought could only be one and the same action on the specialty, and not on any new promise express or implied from the terms of acknowledgment, whatever it might have been. They held that a devisee, who might plead the bar, if it existed, could only plead it on such single action; and observing that he was capable of making the acknowledgment, and the *Statute of Fraudulent Devises* (3 & 4 W. & M. c. 14, s. 7) having declared that the devisee should be liable and chargeable in the same manner as the heir, they concluded without hesitation that the devisee might as properly be said to be liable by virtue of the indenture "as either the real or personal representative," and therefore that, by the acknowledgment, the action—the only action that could be brought—was set free generally, the statutes having nowhere said that it could be brought only against the party making the acknowledgment.

Lord *Cranworth*, who concurred with the Judges "not only in the result at which they had arrived," but in the reasoning "which led them to their conclusion," and also after a thorough investigation of the case, gave very fully his reasons for the independent judgment which he pronounced, and was satisfied that the devisee for life, who there had made the payment, was a "party interested." There remained, as he said, the question "who is affected by such payment? Does it operate against the party only by whom the payment is made, or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other parties liable on the speciality." And then further examining the words of the statute, he says: "It does not in terms confine his right to a right

of action against the person who has made the payment, and we have no right to introduce words for the purpose of so confirming it."

If, then, the case had rested upon the payments made by *Ann Heron*, I think it would have been taken out of the statutes. But the sale by *George Dunn* of the leasehold in 1864, and the application by him of the purchase-money in satisfaction of the arrears of interest and part payment of the principal due on the mortgage, places the case out of all doubt. In him were vested all the trust estates devised by Sir *C. Heron*, including *Newby Grange*, which had been freed from incumbrances by the means I have mentioned, and all the mortgage and trust estates of *Jane Archbold*. He was well aware of the existence of the mortgage, and of the payment of interest by *Ann Heron* up to 1859. He believed, and had good reason to believe, that similar payments of interest had been made since her death. He was, therefore, under no moral obligation, and as certainly under no legal obligation, to resist or impede the payment of a just debt. He accordingly proceeded in the most proper manner to effect the sale, apprising, through his solicitor, Mr. *Harle*, who was trustee for the whole of the *Laing* family, of the steps he was taking, and of the manner in which the consideration-money was applied. There is, therefore, in my opinion, no ground whatever for resisting the Plaintiff's claim upon the grounds set up by the Defendants, or upon any other grounds, legal or equitable. I have said nothing upon the subject of the repeated acknowledgments of the existence of the mortgage by Mr. *Harle*, representing the *Laing* family, and one of the *Rennoldsons*, whose legal personal representative he is, and by Mr. *Heath*, who represents one of the *Rennoldsons*, deceased; and I forbear to remark upon them, though not because I have any doubt as to the effect of those acknowledgments, having regard to the interests of those parties, upon the subject of the suit. I cannot, however, forbear from saying that the difficulty I feel in reconciling some of the statements in their answers with their correspondence, has occasioned me surprise and regret. The decree must be according to the prayer of the bill, for an account of what is due on the mortgage, a sale of the one-fourth of *Viewly Hill* comprised in the mortgage of 1822, and with a declaration that the Plaintiff is entitled to receive

V.-C. B. 1871 PEARS v. LAING.

payment out of the estate of Sir *C. Heron* for the amount which is due to him for principal, interest, and costs on this mortgage; and for this purpose the usual accounts of the real and personal estate of the testator must be directed, and the further consideration, with the costs, reserved.

Solicitors: Messrs. *Pattison, Wigg, Gurney, & King;* Messrs. *Harle & Co.;* Mr. *John Tucker;* Mr. *Adam Burn.*

In re HOME ASSURANCE ASSOCIATION.

V.-C. W.
1871
April 28.

Petition to wind up by Creditor—Right of Petitioner to Dismiss—Costs.

A creditor of a company, who had presented a Petition for a winding-up order, and duly advertised it:—

Held, entitled to dismiss his Petition with costs, notwithstanding the objection of another creditor appearing on it; but the costs of the objecting creditor were included in the order.

THIS was a Petition to wind up the *Home Assurance Association, Limited.*

The Petition stated the formation of the company, and that the Petitioner had taken and paid for ten shares, in consideration of obtaining employment by the company as clerk; that he had commenced an action for his arrears of salary, and recovered judgment for £26 19*s.* 6*d.* and costs, amounting to £27 18*s.* 4*d.*; that an arrangement had been entered into that the amount of debt and costs should be paid by instalments; and that the company made default in making such payments. The Petition further stated that execution had been issued, but there were no assets, and that numerous creditors were pressing the company. The Petition then asked for a winding-up order.

The Petition had been duly advertised.

Mr. *Kekewich* appeared on the Petition, and asked to withdraw it, as the Petitioner's debt had been secured. If he were not allowed to withdraw the Petition, he must ask for a winding-up order.

Mr. *Higgins*, for another creditor of the company:—

The rule of the Court is, that when once a Petition has been presented for a winding-up order, the Petitioner has no right to withdraw it. The justice of this rule is obvious, because a creditor who knows that a Petition to wind up has been presented, is not at liberty to present a second Petition, without the risk of having to pay costs. This is a creditor's Petition, and another creditor can take advantage of it. The case is different in this respect from *Spence's Patent Cement Company* (1).

(1) Law Rep. 9 Eq. 9.

V.-C. W. 1871 *In re* Home Assurance Association.

The Vice Chancellor:—I quite agree with you as to the convenience of the rule you contend for; but is there any authority that a Petitioner who has presented a Petition to wind up a company, and performed all the formalities required, is not at liberty to dismiss it—I object to the word "withdraw"—in the ordinary way?

Mr. *Higgins*:—I am not able to mention any reported case where the point has been expressly decided, though I believe there have been decisions to that effect; but it has certainly been understood by the profession that there is the rule I contend for, otherwise a creditor need only present a Petition, and then withdraw, to secure a fraudulent preference. It is here proved that the company cannot pay its debts, and the creditor for whom I appear has proved his debt by an affidavit, which has not been answered.

Mr. *Keeble*, for the company, opposed the Petition.

Mr. Wickens, V.C.:—

Notwithstanding the argument of Mr. *Higgins*, I must assume that a Petitioner who has presented a Petition to wind up a company, is *dominus litis*. No authority has been cited in support of the rule which he contends for; and in the case of *In re Times Life Assurance and Guarantee Company* (1) the Court held that a Petitioner could dismiss his Petition with costs in the usual way. Independently of any authority, I should have taken the same view. The Petition must therefore be dismissed with costs, which costs will include the costs of Mr. *Higgins*' client.

Solicitors for the Petitioner: Messrs. *Freshfield*.
Solicitor for the Company: Mr. *Moss*.
Solicitors for the opposing Creditor: Messrs. *Vallance & Vallance*.

(1) Law Rep. 9 Eq. 382.

COOMBES *v.* BROOKES.

V.-C. W.
1871
April 21, 28.

Bankrupt Trustee—Jurisdiction of the Court of Chancery—Construction of Bankruptcy Act, 1869, *s.* 117.

"The Court" having power under the 117th section of the *Bankruptcy Act*, 1869, by reference to the *Trustee Act*, 1850, s. 32, to appoint a new trustee in substitution for a bankrupt, is the Court of Chancery.

THIS was a Petition of all the persons beneficially interested in a trust fund, for the purpose of having two new trustees appointed in the room of the three original trustees, of whom two were dead; and the surviving trustee, who was a bankrupt, had absconded. The question raised was, whether, under the 117th section of the *Bankruptcy Act*, 1869, the Court of Chancery had jurisdiction in the matter, or whether the jurisdiction belonged to the Court of Bankruptcy.

The 4th section of the *Bankruptcy Act*, 1869, enacts, that "In this Act, if not inconsistent with the context, 'the Court' shall mean the court having jurisdiction in bankruptcy as by this Act provided."

The 117th section provides, that "where a bankrupt is a trustee within the *Trustee Act*, 1850, sect. 32 of that Act shall have effect so as to authorise the court to appoint a new trustee in substitution for the bankrupt, whether voluntarily resigning or not, if it appears to the Court expedient to do so, and all provisions of that Act and of any other Act relative thereto shall have effect accordingly."

Mr. *Horton Smith*, for the Petition:—

This is the first case that has arisen under the *Bankruptcy Act*, 1869, s. 117.

In *Re Blanchard* (1) it was decided by the Lords Justices that sect. 32 of the *Trustee Act*, 1850, gave the Court of Chancery no jurisdiction to remove a trustee without his consent. In the present case the trustee has become bankrupt, and has absconded, and

(1) 3 D. F. & J. 131.

V. C. W. 1871 COOMBES v. BROOKES.

does not therefore resign. But by the 117th section of the *Bankruptcy Act*, 1869, it is provided, that "where a bankrupt is a trustee within the *Trustee Act*, 1850, sect. 32 of that Act shall have effect so as to authorise the court to appoint a new trustee in substitution of the bankrupt (whether voluntarily resigning or not), if it appears to the court expedient to do so; and all provisions of that Act, and of any other Act relative thereto, shall have effect accordingly." It is submitted that the Court referred to in this section must mean the Court having jurisdiction under the *Trustee Act*, viz., the Court of Chancery, and not the Court of Bankruptcy, and that any other construction of the 117th section of the *Bankruptcy Act*, 1869, would be inconsistent with the context of that section, and with the general scope of the *Bankruptcy Act*, 1869, which is to give the Court of Bankruptcy complete jurisdiction over the assets of the bankrupt divisible amongst his creditors, without, however, extending such jurisdiction to other property, as, for instance, property vested in him as a trustee.

Indeed, sect. 15 of the *Bankruptcy Act*, 1869, expressly enacts that "the property of the bankrupt divisible among his creditors shall not comprise property held by the bankrupt in trust for any other person," and such property will not vest in trustees under a bankruptcy. The Court of Bankruptcy has nothing to do with it: and the terms of sect. 72, large as they are, do not extend to such property. That section only gives complete jurisdiction to the Court of Bankruptcy for the purpose of dealing with the bankrupt's assets divisible among his creditors: *Ex parte Anderson* (1); and also *Ex parte Wood* (13th of March, 1867); and *Ex parte Macdonald* (17th April, 1867)—both before the Chief Judge in Bankruptcy; but in no way extends to any other property; and although the policy of the *Bankruptcy Act*, 1869, is to arm the Court of Bankruptcy with plenary jurisdiction for the purpose of dealing with the bankrupt's assets, even that jurisdiction is not without its limits: *Ex parte Isaac* (2); and it never could have been intended to transfer in one particular instance to the Court of Bankruptcy the familiar function of the Court of Chancery to appoint new trustees, even did not the wording of the 117th section of the *Bankruptcy Act*, 1869, shew, as it is submitted it does,

(1) Law Rep. 5 Ch. 473, 480. (2) Law Rep. 6 Ch. 58.

that the object of the Legislature was merely to provide for a *casus omissus* in the *Trustee Act*, 1850, s. 32.

There is no authority upon the point now in question; but analogies may be drawn from the practice under earlier Acts. Under the *Bankrupt Law Consolidation Act*, 1849, s. 130, the Court of Chancery used to appoint new trustees in place of bankrupt trustees; and even under the *Bankruptcy Act*, 1861, though the Court of Chancery was anxious not to interfere with the jurisdiction of the Court of Bankruptcy in matters connected with the assets of the bankrupt—*Bell* v. *Bird* (1); *Martin* v. *Powning* (2); *Stone* v. *Thomas* (3)—it, notwithstanding, appointed new trustees thereof: *In re Price's Trust Deed* (4); *In re Raphael's Trust Estate* (5).

Under the *Lunacy Regulation Act*, 1853 (16 & 17 Vict. c. 70), ss. 137, 138, it has been held that the Court of Chancery has power to appoint new trustees: *In re Sparrow* (6).

MR. WICKENS, V.C.:—

The *Trustee Act*, 1850, gave, or was supposed to give, jurisdiction to the Court of Chancery to appoint a new trustee in all cases. Then came the case of *In re Blanchard* (7), which excepted cases where the old trustee refused to resign. That probably led to the provision in the *Bankruptcy Act*, 1869, s. 117, which authorized the Court to appoint a new trustee in substitution of a bankrupt trustee, whether voluntarily resigning or not. I think, looking at the whole clause, and the object contemplated, that the right construction is to hold that the word "Court" means the Court of Chancery, and that I have jurisdiction to make an order upon this Petition accordingly.

Solicitors: Messrs. *Withall & Compton.*

(1) Law Rep. 6 Eq. 635.
(2) Ibid. 4 Ch. 356.
(3) Ibid. 5 Ch. 219.
(4) Law Rep. 6 Eq. 460.
(5) Ibid. 9 Eq. 233.
(6) Ibid. 5 Ch. 662.
(7) 3 D. F. & J. 131.

M. R.

1871

May 2, 3, 22.

PIKE *v.* DICKINSON.

Principal and Agent—Account—Debtor and Creditor—Composition Deed—Jurisdiction.

The Defendant acted as the Plaintiff's agent in certain commercial transactions previously and up to July, 1867. In that month the Plaintiff fell into pecuniary difficulties, and executed a composition deed under the *Bankruptcy Act*, 1861, whereby he covenanted to pay a composition of 8*s.* in the pound to his creditors, and they released him from all his liabilities. The Defendant was not present at the meeting at which the composition was agreed upon, and the proper majority of creditors was obtained without reference to him; but he afterwards claimed to be a creditor of the Plaintiff in respect of the said transactions for £300, and his name was inserted in the schedule of the deed as a creditor for that amount, and he assented to the deed and received the composition payable thereunder. Afterwards the Plaintiff filed a bill for an account charging numerous false entries in the accounts rendered by the Defendant:—

Held, that the composition deed was no bar to a decree for account in favour of the Plaintiff.

Affirmed by L.C. 2 R.7 Ch. 61

THIS was a suit instituted to obtain an account of shipments of hops made by the Plaintiff through the Defendant, and of moneys paid and received by the Defendant in respect thereof on behalf of the Plaintiff.

From the year 1863 down to July, 1867, the Plaintiff carried on business as a hop merchant at *Oxford* and also at *Southwark*. He bought large quantities of hops on speculation, and consigned them to various places and persons abroad; and he employed the Defendant, who was a commission merchant carrying on business in *London*, to act as his agent for that purpose at a commission of 2½ per cent., besides regular expenses and charges.

In 1867 the Plaintiff fell into pecuniary difficulties, and on the 24th of July, 1867, he executed a composition deed by which he covenanted to pay his creditors 8*s.* in the pound, by four instalments of 2*s.* at intervals of three months each, from the 10th of July, 1867. The deed contained no assignment of property, but it did contain a release of the Plaintiff and his estate by his creditors. It was duly assented to and registered, and became a valid composition deed within the provisions of the *Bankruptcy Act*, 1861.

While this deed was in preparation, and after a meeting of the Plaintiff's creditors, at which the terms of the deed were assented to, but at which the Defendant was not present, the Plaintiff met the Defendant, who stated that he was a creditor of the Plaintiff, and on being asked the amount due to him, said he could not state it exactly then, but as far as he could make it out at that time it amounted to about £300. Thereupon the Plaintiff (who up to that time was ignorant of the Defendant's claim to be a creditor) caused the Defendant's name to be inserted in the list of creditors annexed to the deed as a creditor for £300. The Defendant assented to the deed, and received the composition payable to him thereunder. The Defendant's assent was not necessary to make the deed valid, a majority of the Plaintiff's creditors being obtained without reference to him. The Plaintiff subsequently investigated the Defendant's accounts, and then for the first time discovered that the Defendant, in the accounts rendered by him, had inserted numerous false charges of the amounts paid by him on account of the shipments. The bill was then filed; and the cause now came on to be heard. The Court was of opinion that the allegations of the Plaintiff as to the false charges in the accounts were fully borne out by the evidence.

Mr. *Jessel*, Q.C., and Mr. *W. F. Robinson*, for the Plaintiff.

Mr. *Swanston*, Q.C., Mr. *Jackson*, and the Hon. *E. Romilly*, for the Defendant:—

First: The relief, if any, to which the Plaintiff is entitled, must be obtained by him in bankruptcy, and not in equity. The Bankruptcy Court has, under sect. 197 of the Act of 1861, complete jurisdiction over the debtor and his creditors; and the Court of Chancery, although it may have jurisdiction, will not exercise it: *Stone* v. *Thomas* (1); *Phillips* v. *Furber* (2). The account between the Plaintiff and Defendant could be investigated in the Bankruptcy Court; and there is no distinction in this respect between a composition deed and a trust deed containing an assignment of property: *In re Mark's Trust Deed* (3).

(1) Law Rep. 5 Ch. 219. (2) Law Rep. 5 Ch. 746.
(3) Law Rep. 1 Ch. 429.

M. R. 1871 PIKE v. DICKINSON.

Secondly: Relief cannot be given in the absence of the Plaintiff's creditors. If they had known that the Defendant, instead of being a creditor of the Plaintiff, was in reality his debtor, they would not have accepted the composition.

Thirdly: The sum inserted in the deed as the amount of the debt due to the Defendant, was arrived at by way of compromise, and is binding both on Plaintiff and Defendant; and the amount cannot be impeached without setting aside the deed *in toto*.

[They also referred to *Lancaster* v. *Elce* (1).]

Mr. *Jessel*, in reply:—

The deed constitutes a separate and independent bargain with each creditor, and therefore none of the creditors other than the Defendant are interested in the question between him and the Plaintiff. The agreement between Plaintiff and Defendant is, that the Plaintiff will pay 8*s*. in the pound on £300 to the Defendant, who is to release the Plaintiff from all liability. The composition is paid by mistake; the Plaintiff discovers that the Defendant is his debtor, and sues for the debt. Why is it necessary to set aside the deed? Can the deed have any more effect than a settled account, which would certainly be re-opened upon the evidence in this case?

There is no jurisdiction in the Bankruptcy Court to make the creditor of a bankrupt pay anything. The creditor's proof may be expunged, but no further relief can be given; and if the bankrupt or his assignees desire to enforce payment from a person claiming to be a creditor, they must institute independent proceedings. The case of *In re Mark's Trust Deed* (2) only shews that the Court of Bankruptcy has jurisdiction to examine a creditor for the purpose of shewing that the composition is unreasonable or is tainted by fraud, but it does not shew that that Court has jurisdiction for the purpose of making a creditor pay.

[The MASTER OF THE ROLLS asked whether the Plaintiff would undertake to divide amongst his creditors anything which he might recover in this suit.

Mr. *Jessel* said that the Plaintiff was not prepared to give such

(1) 31 L. J. (Ch.) 789. (2) Law Rep. 1 Ch. 429.

an undertaking, but was willing to give notice to all the creditors, so as to enable them to make such application to the Court of Bankruptcy as they might see fit.]

May 22. LORD ROMILLY, M.R., after stating the facts and the evidence and the conclusion at which he had arrived as to the falsification of the accounts, continued:—

The result is inevitable that when such conduct as this is proved the account must be reopened; and, indeed, from the first moment that this fact was established to my conviction, I only hesitated as to the mode by which, and the conditions under which, I should adopt this course. The deed of composition seemed to present a considerable difficulty, because, unquestionably, if instead of £300 being due to the Defendant, a large sum of money had been due from him, the state of the Plaintiff's assets would have been materially altered, and the creditors might probably have refused to take so small a composition as 8s. in the pound. Accordingly I made some suggestion to the Plaintiff's counsel to meet this difficulty; but, after turning the thing over in my mind, I have been unable to come to any satisfactory conclusion respecting it; and, upon the whole, I have thought that I should be creating expense and not doing anything effectual if I meddled with it, and that I had better leave the matter to be dealt with by the scheduled creditors parties to the deed of the 24th of July, 1867, as they might think fit; if, indeed, they could do so at all. But I felt it impossible to allow such accounts, affected by such evidence, to go unnoticed when brought in due form before the attention of a Court of Equity. I have accordingly determined to take no notice whatever of the deed of composition of the 24th of July, 1867; and I shall simply direct an account to be taken of all dealings and transactions between the Plaintiff and the Defendant up to the 24th of July, 1867, including therein all receipts and payments subsequent to that period in respect of the transactions begun previously to that period; and if, in the course of taking such account, it shall appear that any account was settled between the Plaintiff and the Defendant, then that leave shall be given to either

M. R. 1871 PIKE v. DICKINSON.

party to surcharge and falsify such accounts, or any items therein. I reserve further consideration, and make a special reservation of the costs of suit up to and including the hearing. I do this because, if the account should turn out favourable to the Defendant, I should not be disposed to give him costs up to and including the hearing in a case where such facts had been proved as I have mentioned, and in consequence of which alone I pronounce the above-mentioned decree.

Solicitors: Messrs. *Simpson & Cullingford;* Mr. *Rowland Miller.*

PIERCY *v.* FYNNEY.

V.-C. M. 1871 May 2.

Partnership Debts—Separate Debts of one Partner—Set-off by Debtor—Jurisdiction in Equity—Money Demand.

A. and *B.* were partners in a firm. *A.* allowed a debtor to the partnership to set off a separate debt of his own against money due to the firm, the debtor knowing the interest which *B.* had in the debt. *B.* filed a bill against the debtor and against *A.* to have it declared that the debtor had no right to retain his share in the debt towards payment of the separate debt of *A.*:—

Held, upon demurrer, that, although one partner could bind another in the receipt and payment of partnership debts, he could not set off his separate debts against the debts due to the firm; and the debtor's knowledge of the co-partner's interest rendered the bill sustainable as against him:

Held, also, that this was a proper subject for a suit in equity, since one partner must sue in an action at law in the name of himself and his co-partner.

DEMURRER.

The bill alleged as follows:—

The Plaintiff *Robert Piercy* and the Defendant *Benjamin Piercy*, who were brothers, were in partnership as engineers, the Plaintiff being interested in such co-partnership to the extent of one-third, and the Defendant *Benjamin* to the extent of two-thirds; that as such engineers the partners had a large claim against the *Cambrian Railway Company* as their debtors. The Defendant *Benjamin Piercy* had since carried on a separate business as a contractor on his own sole account, and had been in the habit of borrowing sums of money, for use in his business and for his private purposes, from the Defendant *Frederick A. Fynney*. The *Cambrian Railway Company*, not being in a situation to pay the claim, entered into an agreement with *Benjamin Piercy*, acting on behalf of himself and his brother, to pay it in *Lloyd's* bonds to the amount of £54,000. The agreement so entered into also provided that the Defendant *F. A. Fynney*, who was largely interested in the *Cambrian Railway Company*, should receive £4000 of such bonds in consideration of his services in negotiating the settlement of the claim, and that he should purchase from the partners the remaining £50,000 of the *Lloyd's* bonds for the sum of £30,000.

V.-C. M. 1871 PIERCY v. FYNNEY.

In pursuance of this agreement the £54,000 bonds were handed over to the Defendant *F. A. Fynney*, and *Benjamin Piercy* thereupon signed the following memorandum:—"Sold to Mr. *Fynney* £50,000 *Lloyd's* bonds in the *Cambrian Railway Company* for the sum of £30,000." The bonds had since been sold by *F. A. Fynney*, or applied by him to his own purposes. The result of this agreement and purchase was, that the Plaintiff and the Defendant *Benjamin Piercy* became entitled to receive from *F. A. Fynney* on such joint account the sum of £30,000, of which sum one-third part, being £10,000, belonged to the Plaintiff. But the Plaintiff had not received from the Defendants or either of them any part of the said £10,000, or any money in respect of his share and interest in the purchase-moneys, but the whole sum was still due and owing to the Plaintiff.

The bill then stated that the Plaintiff had recently discovered that some arrangement had been made between the Defendants without his knowledge or authority, by which the Defendant *F. A. Fynney* claimed to apply, and insisted that he had applied, the said sum of £30,000 towards payment of debts and liabilities due from the Defendant *Benjamin Piercy* personally to *F. A. Fynney*, in which debts the Plaintiff was not in any way interested or concerned; and that the Defendant *F. A. Fynney* had full and express notice previously to and at the time of the purchase that the bonds so purchased by him were not the property of *Benjamin Piercy* only, but that they were the joint property of the Plaintiff and *Benjamin Piercy*, and that the Plaintiff was interested in the £30,000; and that throughout the transactions aforesaid *F. A. Fynney*, by reason of his intimate acquaintance with the affairs of the railway company, was well aware that the Plaintiff was in fact interested in and entitled to a third share of the bonds and purchase-money.

The bill prayed that the Defendant *F. A. Fynney* might be ordered to pay over the amount due from him for the bonds so purchased to the Plaintiff and the Defendant *Benjamin Piercy*, according to their respective shares therein; and that it might be declared that *F. A. Fynney* was not at liberty to retain or apply the share of the Plaintiff in such purchase-moneys towards payment of any debt or liabilities of the Defendant *Benjamin Piercy*

to him, and that all such payments as against the Plaintiff's share might be disallowed.

The case came on upon a demurrer by *F. A. Fynney.*

Mr. *Glasse*, Q.C., and Mr. *Humphreys*, in support of the demurrer:—

The claim made by this bill is in respect of a legal debt; it is a money demand which ought to be recovered at law and not in equity. It is not a bill for specific performance, but it prays that the Defendant *Fynney* may be ordered to hand over the amount due from him for the bonds to the Plaintiff. This is distinctly a subject proper for a Court of Law, and if such bills are entertained, this Court may be made the tribunal for the trial of all money demands. The complaint is, that the debt being due from *Fynney*, it had been settled by *Benjamin Piercy*. There is no charge of fraud set up by the bill, and there is no allegation that anything was done by the Defendant *Fynney* after notice given him. There is in fact no equity set up by the bill, and it was laid down in *Grenville Murray* v. *Earl of Clarendon* (1) that a general allegation will not suffice for the purpose of supporting a bill against a demurrer. The Defendant admits all the statements in a bill to be correct for the purposes of a demurrer, but with this qualification, that it will not do to allege a thing which does not appear to be the fact upon the circumstances stated in the bill, in order to entitle the Plaintiff to relief. The money now claimed is not due, since it has been to all intents and purposes paid by *Fynney*, by being set off against a debt due to him by *Benjamin Piercy*, who, as a member of the partnership, had full right to give a discharge for it. This was decided in *Wallace* v. *Kelsall* (2), where, to an action by three Plaintiffs for a joint demand, the Defendant pleaded an accord and satisfaction with one of the Plaintiffs by a part payment in cash and a set-off of a debt due from that one of the Plaintiffs, and it was held that the plea was good, without alleging any authority from the other two Plaintiffs to make the settlement; and in *Emery* v. *Mucklow* (3) it was held that, where one

(1) Law Rep. 9 Eq. 11, 17. (2) 7 M. & W. 264.
(3) 10 Bing. 23.

V.-C. M. 1871 PIERCY v. FYNNEY.

of several Plaintiffs dissented to the bringing of an action, the Court would not interpose unless upon a suggestion of fraud.

Mr. *Cotton*, Q.C., and Mr. *Millar*, for the bill:—

We admit the power of a partner to bind the partnership in the receipt or payment of a debt, even after a dissolution; but this is not the case where, from the nature of the transaction, it can be inferred that it is the separate debt of one of the partners, in which case previous authority or subsequent ratification by the other partners must be shewn. This was held in *Ex parte Bonbonus* (1); and in *Hope* v. *Cust*, a case cited by *Lawrence*, C.J., in *Shirreff* v. *Wilks* (2), Lord *Mansfield* is reported to have said: "There is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others." But this does not apply to a case like the present, where the debtor knew that the partner to whom he paid or set off the money would apply it to his own private debt. The payment here was in fraud of the rights of the Plaintiff, who was entitled to a share of the partnership debt; and it is alleged by the bill that the Plaintiff's rights were well known to the Defendant *Fynney*, who had distinct notice of the fact and a knowledge of the portion to which the Plaintiff was entitled. This is setting off a debt due to both partners by paying the amount to one partner for a separate debt due by him. It was held in *Gordon* v. *Ellis* (3) that a plea was bad because it was an attempt to set off a debt due from one partner against a debt due to the firm; and the same principle was acted upon in *Young* v. *White* (4), *Pritchard* v. *Draper* (5), and *Nottidge* v. *Prichard* (6).

As regards the tribunal for the trial of this case, it is true, no doubt, that money demands are usually tried at law; but in this case the Defendant *Benjamin Piercy* would of course refuse to join in the action with his brother the Plaintiff; and, moreover, the circumstances affecting the transaction could not be so well brought out at law as in equity, where the dissenting partner can be made a Defendant to the suit.

(1) 8 Ves. 540.
(2) 1 East, 48.
(3) 2 C. B. 821.
(4) 7 Beav. 506.
(5) 1 Russ. & My. 191.
(6) 2 Cl. & F. 379; 8 Bli. (N.S.) 493.

Mr. *Glasse*, in reply:—

It is for the Plaintiff to make out that the property now claimed by the bill actually belongs to him. For all that appears on this bill, it may be that he has not at the present time any right to the £10,000, which may have been accounted for in the partnership. Under any circumstances, the remedy is not in this Court, but in a Court of Law, where the Plaintiff would be entitled to use the name of his brother *Benjamin Piercy* to recover the amount if it is due to him.

SIR R. MALINS, V.C., after stating the principal allegations in the bill, continued:—

No complaint is made by the Plaintiff as to the transaction by which his brother *Benjamin Piercy* entered into an agreement on his behalf to receive the £54,000 *Lloyd's* bonds in discharge of the debt due to the partnership from the *Cambrian Railway Company*. There is no doubt that *Benjamin Piercy* was entitled to do this as one of the ordinary transactions of the partnership business. Nor is there any objection raised by the Plaintiff to his brother agreeing to hand over £4000 of the bonds to *F. A. Fynney*, nor to the sale to him of the remaining £50,000 bonds for the sum of £30,000. Up to that point the Plaintiff adopts the transaction, and admits that his brother, in pursuance of his duty as partner, sold the bonds for what he calls an adequate price, and he only wants to have his share of the £30,000, which was £10,000, he being entitled to one-third of the partnership assets.

Now, upon the allegations in the bill up to this point, I take it to be quite clear that, irrespective of any settlement of partnership accounts between the Plaintiff and *Benjamin Piercy*, the Plaintiff was entitled to one-third of the purchase-money of these bonds, namely, £10,000; and of that fact, upon the allegations in the bill, the Defendant *Fynney* had distinct notice, or, in other words, he had notice that it was a clear fund belonging to the partnership, of which the Plaintiff was entitled to one-third and the Defendant *Benjamin Piercy* to two-thirds. The discharge of the debt was within the scope of a partner's authority—that implied authority which one partner always has to bind another in the affairs of the partnership—and, consequently, if this £30,000 had been paid to

V.-C. M. 1871 PIERCY v. FYNNEY.

Benjamin, Benjamin was in a situation to give a valid discharge for it. It is clear, as a matter of law, and it is so laid down in the case of *Nottidge* v. *Prichard* (1), decided by Lord *Brougham*, that it is within the scope and authority of one partner, even after the dissolution of the partnership, to receive and give a discharge for a debt owing to the partnership. If this money had been paid to *Benjamin*, and *Fynney* had received a receipt for it, he would have been perfectly discharged, and the Plaintiff must have looked to his brother and partner only for payment. But then it is alleged that the Defendant *Fynney*, instead of paying the money, insisted that he applied it towards payment of debts or liabilities due to him from *Benjamin Piercy* personally, in which the Plaintiff was not in any way interested or concerned, and that the Plaintiff had never authorized or sanctioned this appropriation of the money.

Now the law is clearly settled, and authorities have been cited on both sides which shew, as I have said, that a person may pay a debt owing to a partnership to any one of the partners, even after its dissolution; but it is equally clear, if any person takes a partner's bill or cheque for the payment of a private debt due from one of the partners, with a knowledge that the bill or cheque or payment is made without the assent of the other partners, in a certain sense he becomes a party to the fraud on the other partners, and he cannot recover upon the bill or cheque; and if he receives the money he cannot retain it. Upon the allegations of the bill, I take it to be clear, beyond all doubt, that *Fynney* had distinct and positive notice that this £30,000 was a partnership debt owing to the firm of *Benjamin* and *Robert Piercy*, and upon every principle of law, therefore, as well as of equity, he was prohibited from entering into any transaction by which the private debt owing to him (*Fynney*) from *Benjamin Piercy* was to be a set-off against his debt. In other words, he was not at liberty to allow the £30,000, or at least any part of it belonging to the Plaintiff, to be applied in payment of the debt which was due, not from the Plaintiff, but due from him, *Benjamin Piercy*. This is upon the general principle that a partner has an implied authority to pay the partnership debts; but there is no authority for this, and it is in contravention of every principle of honesty that one

(1) 2 Cl. & F. 379; 8 Bli. (N.S.) 493.

partner should apply assets, not to pay the partnership debts, but his own individual liabilities.

This being a demurrer, the facts stated upon the allegations of the bill are admitted, and the right of the Plaintiff to recover the £10,000 is perfectly clear; therefore it resolves itself into this, and that is the ground of the demurrer: it is said that it is a question for law and not a question for equity. I confess my own impression is, that it is a question either for law or equity. At the same time, I am bound to say from the cases cited, inasmuch as the rule of law is, where a debt is due to two persons, they must both be Plaintiffs, and there is great difficulty in pleading and proceeding where one of the two Plaintiffs has released the debt for an improper consideration, I think that that is certainly a reason for transferring the matter to this Court. I cannot, therefore, allow the demurrer.

This is a case which, according to the allegations of the bill, falls within the principle of that class of cases which says that no man can be permitted in this Court to apply the money of one man to pay the debts of another. It is a case in which the money of the Plaintiff has been applied by *Benjamin Piercy* to pay his own individual debt owing to Mr. *Fynney*, with full knowledge on the part of *Fynney* that it was not *Benjamin's* money, but the money of the Plaintiff. That is, in my opinion, within the principle of *Wilson* v. *Moore* (1), and that class of cases, in which it was decided that, if a banker, or a merchant, or a person of any description receive money in payment of a debt which he has good reason to believe does not belong to the person who pays it, he cannot retain it against the person to whom it belongs, but he must return it. Here *Fynney* has received money from *Benjamin Piercy* which did not belong to him, but which belonged to the Plaintiff. My opinion, therefore, is, that this bill is sustainable. I give no opinion as to whether the Plaintiff might or might not succeed at law, but I am clearly of opinion that he is entitled to sue in this Court; and, upon all these grounds, the demurrer must be overruled.

Solicitor for the Plaintiff: Mr. *H. Skynner.*
Solicitor for the Defendant: Mr. *J. B. Batten.*

(1) 1 My. & K. 337.

V.-C. M.

1871
May 26.

In re LORD HOTHAM'S TRUSTS.

Trustees—Petition for Advice of Court—Trust to lay out Personalty in Land—Expenditure on Estate—Rebuilding Parsonage.

H., by his will, directed his trustees to lay out his residuary personalty in the purchase of land to go along with certain settled property. The settled property comprised an advowson, of which the parsonage-house was, at the testator's death, in a ruinous state, and he was about to rebuild it:—

Held, that the trustees might properly lay out part of the residuary personalty in rebuilding the house.

LORD *HOTHAM*, by his will, dated the 25th of June, 1868, after reciting that by certain indentures of lease and release of the 10th and 11th of February, 1817, and of the 27th and 28th of April, 1817, he was tenant for life in possession of certain estates, and that he was entitled to a lien for certain sums of money upon the same estates, and was also entitled to certain other estates in fee simple, and that he was desirous that the settled estates should be re-settled so as to be enjoyed for as long a period as the law would allow by the person entitled to the Barony of *Hotham*, devised his real estate to trustees upon trust, in case a re-settlement of the settled estates took place, to settle the same to the same uses and trusts as the settled estates should be subject to on re-settlement. And he bequeathed his residuary personalty to the same trustees to be laid out in the purchase of land to be conveyed upon the same limitations.

The testator died in December, 1870, and left a large residue of personalty to be invested in accordance with the provisions of the will.

The settled property comprised the advowson of the rectory of *Hutton Cranswick*, in the diocese of *York*. A short time before Lord *Hotham's* death the living became vacant, and on the 7th of October, 1870, he wrote a letter to the Archbishop of *York*, which, after stating the condition of the parish at that time, continued as follows:—

"The parsonage-house very bad, but this I shall be ready to put into proper repair should it be found capable of reparation, or to build a new one suitable for the living, should that be found necessary.

"The late incumbent died, I think, three months ago, and I should have written to your Grace sooner on this subject but for your visit to *Scotland*. And having now laid before your Grace, with entire frankness, the existing state of things in this parish, I can only say that if among your numerous candidates for employment you know one likely to obtain influence over and to reclaim a sadly neglected community, I shall be most happy to present him."

Lord *Hotham* died before any appointment was made, and the presentation lapsed to the Archbishop.

The trustees now petitioned to have the opinion or advice of the Court as to whether they might, out of the residuary estate, defray the whole or any, and what part, of the expense of rebuilding or repairing the parsonage-house.

It appeared that it was necessary that the house should be rebuilt.

Mr. *Pearson*, Q.C., and Mr. *Pemberton*, for the Petitioners:—

The proposed expenditure will increase the value of the advowson, and consequently it is for the benefit of the persons entitled to the estates, and a similar expenditure has been allowed on that ground: *In re Incumbent of Whitfield* (1). This case was approved of and followed by the Lords Justices in *In re Dummer's Will* (2).

Mr. *Jones-Bateman*, for the present Lord *Hotham*, the tenant for life of the estates.

SIR R. MALINS, V.C.:—

I am satisfied that Lord *Hotham* intended to have invested his money in this way, and would have done so if he had lived, and under the circumstances I think it a most proper expenditure. It is one which will increase the value of the advowson, and therefore of the settled estates, and is consequently within the spirit of the trust for laying out personalty in land, and of the cases cited. I am therefore of opinion that the expenditure may properly be made.

Solicitors: Messrs. *Meynell & Pemberton*; Messrs. *Bennett, Dawson, & Bennett.*

(1) 1 J. & H. 610. 7 Jur. N.S. 909 (2) 2 D. J. & S. 515. 11 Jur. N.S. 615.

V.-C. M.
1871
Jan. 13, 14.

In re RUSSELL ROAD PURCHASE-MONEYS.

Successive Incumbrancers—Priority—Legal Estate without Notice—Acquisition of legal Reversionary Term.

A legal estate to give priorities as between incumbrancers having equal equities is not of necessity such an estate as will enable the holder to bring ejectment.

A., having a legal term of ninety-nine years in a house, mortgaged it to *B.* by way of sub-lease, reserving a reversion of two days. He then made an equitable charge by a memorandum to *C.* He then assigned the term to *D.* to secure a further advance. *D.* had notice of *B.*'s incumbrance, but not of *C.*'s. *C.* registered in *Middlesex*, but *D.* did not search the register, and was therefore not affected by notice:—

Held, by the Vice-Chancellor, that the equities between *C.* and *D.* being equal, the reversion of two days which *D.* acquired by his assignment was a legal estate which entitled him to priority.

On appeal, the Lords Justices, after hearing the question argued, expressed themselves not prepared to affirm this view, but the matter was compromised before they delivered judgment.

ON the 8th of August, 1864, Lady *Holland* leased a piece of ground, with a house known as No. 1, *Russell Road, Kensington*, to *Charles Frederick Phelps*, for ninety-nine years, subject to a ground-rent of £10.

By an indenture of the 21st of February, 1865, *Phelps* mortgaged the property to *William Martyn* for £1000, by underlease, for the residue of his term, less two days; and by an indenture dated the 2nd of May, 1867, indorsed on the previous deed, he made a further charge of £200 in favour of *Martyn*.

In the year 1866 the freehold reversion in No. 1, *Russell Road*, and seven adjoining houses, of which *Phelps* was lessee, were purchased by him and conveyed to a trustee for him.

On the 1st of June, 1867, *Phelps* gave to *James Dearle Padgett* a memorandum in the following words:—

"*Charles Frederick Phelps*, of 1, *Russell Road, Kensington*, to *James Dearle Padgett, Pantechnicon, S.W.*

"In consideration of the moneys you have advanced to me, or may advance to me, I hereby give you an equitable mortgage by way of second charge upon my freehold ground-rents, amounting

to £115 per annum, on eight houses situate in *Russell Road, Kensington*, being Nos. 1 to 8 inclusive, the same being already mortgaged to Messrs. *Stileman & Neate* for the sum of £2300, and I hereby acknowledge such equitable mortgage to be given as a collateral security for the due payment of all sums of money paid by you, or to be paid by you, to me or for me; and I further hereby make over to you all my interest in the rentals of the aforesaid houses, due at and after Midsummer Day next, with sole power to receive the same for your own absolute benefit, with a letter from me to the tenants empowering you so to receive the same until your entire claim upon me or my estate shall have been discharged; and, finally, I agree to execute any further document that you may consider necessary for confirming this when called upon. As witness my hand, this first day of June, 1867.

"Witness, *Jas. W. Padgett.* "*Chas. F. Phelps,*
"*Jas. D. Padgett.*"

The mortgage to Messrs. *Stileman & Neate* was only a charge upon the ground rents, and did not affect the present question.

By an indenture dated the 18th of April, 1868, which recited the indenture of the 21st of February, 1865, the property comprised in the lease of the 8th of August, 1864, was assigned by *Phelps* to *Lucius Henry Spooner*, for the whole residue of the term, by way of mortgage, to secure a sum of £3750 and interest.

The charge in favour of *Padgett* was duly registered in *Middlesex*, but no notice of it was given to *Spooner* when his mortgage was made, and he did not search the register.

By an indenture of the 12th of November, 1869, an assignment and transfer of *Martyn's* mortgage term and debt was made to *John Bartley and Charles Saxton.*

On the 29th of August, 1868, *Phelps* was adjudicated a bankrupt; but as the amount advanced on the security of the property exceeded its value, no claim was made by the assignee.

Spooner now commenced negotiations for the sale of the property to *Charles Leeming*, and, while the negotiations were pending, notice of *Padgett's* charge was sent to the purchaser, and *Spooner* then, for the first time, became aware of the charge. An agreement was come to between all the parties interested, and was made on the 13th of January, 1870, whereby the property was agreed

V.-C. M. 1871 *In re* RUSSELL ROAD PURCHASE-MONEYS.

to be sold to *Leeming* for £2335; and it was further agreed that the purchase-money should be applied, first, in paying off Messrs. *Bartley & Saxton's* charge, and that the residue, which amounted to £900, should be paid into Court under the *Trustee Relief Act*.

The purchase was accordingly completed on the 7th of March, 1870, and the £900 paid into Court. The costs of paying in the money being deducted, the actual balance paid in was £891 19*s.*, which was invested in £946 7*s.* 4*d.* consols., and *Spooner* now petitioned for payment of the fund to him.

The question to be determined was, the right to the fund in Court as between *Padgett* and the Petitioner. On the face of the Petition a question was raised, whether the charge in favour of *Padgett* operated upon anything more than the ground-rents of the houses in *Russell Road*, but the point argued on the present occasion was, whether the Petitioner, by taking an actual assignment, had not a legal estate, which, taking the equities between the parties to be equal, gave him priority; and that being determined in favour of the Petitioner, the question of what was included in the memorandum, on which evidence had been gone into, was not argued.

Mr. *Pearson*, Q.C., and Mr. *W. Barber*, for the Petitioner:—

For the purpose of the present question the parties must be treated as if no sale had taken place, and the contention had been as to priorities in a foreclosure suit. The equities of the parties are therefore equal, and such being the case the Petitioner has priority by reason of having acquired a legal estate. The mortgage to *Martyn* was by underlease, leaving a reversion of two days in the mortgagor, and the mortgage to the Petitioner was by assignment of the whole term, and he thereby acquired the reversion of two days, which was a legal estate and gave him priority: *Morecock* v. *Dickins* (1). The only difference between that case and the present is, that here the mortgage was of a leasehold interest instead of a freehold reversion.

[They also cited *Belchier* v. *Renforth* (2).]

Mr. *Glasse*, Q.C., and Mr. *Everitt*, for *Padgett*:—

The reversion in the two days is not such a legal estate as gives

(1) Amb. 678. (2) 5 Bro. P. C. 292.

the Petitioner priority. If he had had the reversion in fee conveyed to him, no doubt the case would have been different. He would then have brought himself within *Belchier* v. *Renforth* (1). Fully adopting *Morecock* v. *Dickins* (2), it goes no further than to give priority to an incumbrancer who acquires a legal reversion in fee. The legal estate, in order to give priority, must be such as entitles its possessor to bring ejectment. In this Court *primâ facie* incumbrancers rank according to priority in time, and the onus is upon the Petitioner to shew that he has such a legal estate as will displace this priority, which gives a prior right to redeem, and therefore a better equity: *Ruper* v. *Harrison* (3). What *Phelps* had to convey to the Petitioner was an equitable interest in the sub-term granted to *Martyn*, and a legal interest in the reversion of two days.

[The Vice-Chancellor:—The question of priority came before me lately in *Hunter* v. *Walters* (4). *Head* v. *Egerton* (5), which has been called a landmark of the law, determined that where one man has the legal estate but not the title-deeds, and the other the title-deeds but not the legal estate, the Court will not assist either party. This case was followed in *Thorpe* v. *Holdsworth* (6).]

In *Newton* v. *Newton* (7) the Court ordered a deed to be given up to the party in whose favour a prior equitable title was established.

The Court does not give any better equitable title to a man who has the legal estate, but allows an incumbrancer to protect himself by getting in a legal estate: *Willoughby* v. *Willoughby* (8). Just so a mortgagee used to protect himself by getting in an outstanding term. But the reversion of two days was not such a legal estate. The Petitioner had simply an equitable right to redeem, and a reversion of two days, which would entitle him to an apportionment of the purchase-money if the property were sold. Moreover, as regarded the two days, *Phelps* was only a trustee for *Martyn*, and there was notice on the face of the deed that he was

(1) 5 Bro. P. C. 292.
(2) Amb. 678.
(3) 2 K. & J. 86.
(4) Law Rep. 11 Eq. 292.
(5) 3 P. Wms. 280.
(6) Law Rep. 7 Eq. 139.
(7) Ibid. 4 Ch. 143.
(8) 1 T. R. 763.

V.-C. M. 1871

In re Russell Road Purchase-moneys.

such trustee. Consequently no legal estate could be acquired by means of it: *Sharples* v. *Adams* (1).

Mr. *Pearson*, in reply:—

Phelps mortgages to *Martyn* for a term, and then gives an equitable charge to *Padgett*. *Padgett* has, consequently, an equitable charge on the whole of *Phelps*' estate, subject to the term carved out of it in favour of *Martyn*. Then *Phelps* mortgages his whole term to the Petitioner. Thus the Petitioner is the assignee for the whole term, and is the person who in law would have the right to bring ejectment.

[The Vice-Chancellor:—*Walker's Case* (2), explains very clearly the difference between a lessee and an assignee. Between lessor and lessee there are two privities—privity of estate, and privity of contract. Between lessee and assignee there is only one privity, that of estate.]

Unless the law as to getting in legal estates is different in respect to terms of years from what it is in respect of a fee-simple estate, the case is clear.

Sir R. Malins, V.C.:—

This case involves a point of very great nicety; but the length of the argument has given me an opportunity of carefully considering the subject both here and in private; and the result is, that I think I can dispose of it.

The transactions out of which the question arises are these:—In the year 1864 Lady *Holland* granted a lease of the property, the subject of this mortgage, to one *Phelps* for ninety-nine years, thereby giving him a legal term. In the following year *Phelps*, desiring to raise money, applied to a gentleman named *Martyn* to lend him £1000. Mr. *Martyn* agreed to take a mortgage, and the usual course was adopted; *Phelps*, instead of assigning the whole term, demised for ninety-nine years, less two days, retaining the reversion of two days in himself. The object of that course, as is plain, was to prevent the creation of a privity of estate between the lessor, Lady *Holland*, and the mortgagee, Mr. *Martyn*, which

(1) 32 Beav. 213. (2) 3 Rep. 22 a.

would have made him liable to the performance of the covenants and the payment of the rent, it being settled, as is well known, in *Walker's Case* (1), that between lessor and lessee there are two privities: privity of contract by virtue of the covenants, the liability upon which the lessee can never get rid of without the consent of the lessor; and privity of estate, which is got rid of by assigning over. And there is, therefore, this difference between an original lessee and an assignee, that the latter can get rid of his liability which arises solely from privity of estate, while the original lessee cannot do so.

Then *Phelps*, desiring to raise more money, applied to Mr. *Padgett*, who, having, I assume, notice of *Martyn's* mortgage, took a mere written charge on the property, which, however, as between the parties, was a mortgage just as good and as effective in this Court as an actual demise. *Padgett* also took the precaution—which in principle ought, in my opinion, to give him priority—of registering his security in the *Middlesex* Registry. If the question had not been concluded by authority, I should have been of opinion that, upon principle, a diligent man who registers his security ought to have priority, and it ought to be the duty of a man dealing subsequently with the property to search the register. But by *Morecock* v. *Dickins* (2), following a previous decision of Lord *Camden*, it was decided that it is not negligence not to search the register, and that a man has not notice who does not look at the register. Therefore the registration makes no difference.

Now, I have always understood, and still understand, that a termor for years making an underlease retains in himself the whole estate. Therefore the whole estate being in *Phelps*, *Padgett* has a charge upon the reversion of the two days, which, according to the reasons I have stated, is the whole term. He has a sort of equitable estate during the currency of the underlease to *Martyn*, and an equitable charge on *Phelps'* legal reversion of two days.

Now comes the transaction which raises the unfortunate question, which of two innocent parties is to suffer. *Phelps* applies to *Spooner*. He knew of *Martyn's* security, but not of *Padgett's*, and took an assignment of the whole term which remained vested in

(1) 3 Rep. 22 a. (2) Amb. 678.

V.-C. M. 1871

In re Russell Road Purchase-moneys.

Phelps. Now, to see what the term was, take the test of privity. Lady *Holland* could have had no remedy against *Martyn,* because he was only sub-lessee; and suppose she, having granted the lease, conveyed the reversion in fee only, her assignee of the reversion would have been in no better position. But with regard to *Spooner,* who was the assignee of the whole term, there would have been a privity of estate between him and the assignee of the reversion. It seems to me upon every principle that a man who has a term of years, and out of that carves a shorter term, retains the original term in himself. This ninety-nine years' term is the tenure on which the bulk of property in this great town is held. And if a man having a term for ninety-nine years in a house, and not desiring to occupy it, lets it for seven years, he clearly has vested in him the term of ninety-nine years, and to that term the sub-lease, and the rents and covenants contained in it, will be incident; and if he grants the reversion, between the assignee and the original lessor there will be privity of estate, and each of them can sue the other upon the covenants contained in the lease.

In law the duration of a term is immaterial, and a term for twenty-one years is as great an estate as one for 21,000 years. The distinction is between a chattel interest, which is a term for years, and a freehold interest. A freehold interest of the smallest duration is greater in the contemplation of law than the longest term. Upon this principle the reversion of two days which is retained is the estate, and so long as it is retained the privity of estate is not destroyed.

Then, applying these principles, what are the respective positions of these two mortgagees? *Padgett* undoubtedly has an equitable charge upon all that *Phelps* could convey to him, and a right to call upon *Phelps* to convey that legal estate to him, and might have enforced it by bill, but he did not do so. *Spooner* is an assignee of *Phelps* for valuable consideration without notice of *Padgett's* charge. He has, consequently, in every respect as good an equity as *Padgett.* Has he anything better? He has an actual assignment of all that remained in *Phelps,* which, for the reasons I have stated, was the whole of the original term which Lady *Holland* granted.

But there was a point very much argued by Mr. *Glasse* and Mr. *Everitt*, which illustrates how very difficult it is to lay down absolute and general rules. The general rule is, that in the case of equal equities between mortgagees without notice the one who has the legal estate will prevail; and it was argued that the legal estate, to give priority, must be such as will entitle the party to recover in ejectment. But that can hardly be; for suppose *A.*, seised in fee of a large estate, creates an equitable charge for £10,000 in favour of *B.* by a written memorandum, and then goes to another person who has no notice of this charge, and raises money by way of mortgage, and conveys the fee, nobody will doubt that the second mortgagee has priority. But the land which is the subject of the mortgage is probably in the possession of tenants against whom there is no right to maintain ejectment, and what is mortgaged is in fact the reversion. The mortgagee has the freehold in possession, but not the land in possession. Yet no one doubts that, under these circumstances, both incumbrancers have equal equities; but one has something more, and that is the legal estate; and, whatever the nature and extent of the legal estate, it gives him priority.

Upon the same principle, it appears to me, as between these innocent parties (I am sorry for the position of one of them), that *Spooner*, by taking an assignment, has put himself in a position of priority over *Padgett*.

With regard to the argument that *Padgett* had a better equity by reason of his right to redeem *Martyn*, it is true that if he had redeemed him that would have given him priority—that is, if he had got in the legal estate. But *Spooner* had the same right, and in the result neither of them got it in. Therefore the parties remained just as they were. And anything short of actually getting in the legal estate is immaterial, for in *Belchier* v. *Renforth* (1) the first point decided was, as expressed by Lord Keeper *Northington* (2): "A third mortgagee, having lent his money without notice of a second, may, by paying off the first, hold the estate against the second till he has been paid what is due to him upon both. This is what Lord *Hale* called the '*tabula in naufragio*,' and it has continued to be the practice ever since without any

(1) 5 Bro. P. C. 292. (2) 1 Eden, 529.

V.-C. M. 1871 — *In re* Russell Road Purchase-moneys.

variation." This case was followed by *Robinson* v. *Davison* (1), in which the same point arose; and it was held that, notwithstanding a suit by a second mortgagee to get in the legal estate, the third mortgagee is at liberty pending that suit to buy it up and get it in. The rights of the parties are represented here by the money, and the consequence will be that *Spooner* will take it.

Mr. *Padgett* appealed from the Vice-Chancellor's decision, and the question was argued before the Lords Justices on the 13th and 22nd of April. At the close of the arguments on the latter day the Lord Justice *James* observed that their Lordships were not then prepared to affirm the decision of the Vice-Chancellor on the point of law, and therefore desired that the question should be argued whether, on the construction of *Padgett's* charge, it included anything more than the ground-rents.

May 1. The Petition was in the paper to be argued; but in the meantime an agreement for a compromise had been come to, and an order was taken by consent for a division of the fund, and consequently no judgment was delivered by the Lords Justices. (2

Solicitors: Messrs. *Mackenzie, Trinder, & Co.*; Mr. *Pearpoint.*

V.-C. M. 1871 — *May 5.*

In re BEAUMONT'S MORTGAGE TRUSTS.

Mortgage—Power of Sale—Sale by Mortgagee, with an Exception of Minerals—25 & 26 Vict. c. 108—Service of Petition on subsequent Mortgagees.

13 Eq. 636

Mortgagees are within the *Confirmation of Sales Act*, and may have liberty to sell under their power of sale, with a reservation of the mines and minerals in the land sold, and incidental powers of working them.

It is not necessary for mortgagees, in order to exercise the power of selling with such a reservation, to serve the Petition on any subsequent incumbrancers. (3

By an indenture, dated the 19th of November, 1858, certain property, consisting of an estate at *Darfield*, in the county of *York*,

(1) 1 Bro. C. C. 63.

(2 See W.N. (1871) 89 (3 See M. J. Scan. R. Jackson's Mortge 27 Feb 187
J.M. cited Dart Vol P. 1073.

and all minerals, veins, beds or strata of coal and clay lying thereunder, and the rents and royalties reserved and made payable to certain lessees under a lease for twenty-one years, dated the 6th of December, 1856, was mortgaged to certain trustees to secure £26,000 advanced by them, subject to any future lease for a term not exceeding twenty-one years, to take effect in possession, and reserving a rent to the person entitled to the legal estate. The mortgage deed contained the usual power of sale.

The lease of the 6th of December, 1856, was of the coal under part of the estate. It was surrendered in May, 1867, and a new lease granted by the mortgagees and the mortgagor for the term of forty-five years from the 1st of April, 1866. There were some valuable beds of clay on the estate which had never been leased, but were worked by the mortgagor.

The mortgagees now proposed, with the consent of the mortgagor, to sell under their power, and it was thought expedient to sell the minerals separately from the land.

They and the mortgagor accordingly joined in presenting a Petition under the *Confirmation of Sales Act* (25 & 26 Vict. c. 108), praying in effect for liberty to exercise the power of sale of the land comprised in the security, with a reservation of the coals, mines, beds of clay, and minerals therein, and incidental rights of working the same.

There were some subsequent mortgagees, but they were not served.

Mr. *Dickens*, for the Petitioners:—

A first mortgagee with a power of sale can make a good title without the subsequent incumbrancers, and it is no more necessary to serve them with a Petition under this Act than beneficiaries entitled in remainder after a life estate on a Petition by trustees having a power to sell with consent of the tenant for life, in which case service is unnecessary: *In re Pryse's Estates* (1).

It has been questioned whether mortgagees are within the Act, but such an order has been made upon a Petition by mortgagees.

(1) Law Rep. 10 Eq. 531.

V.-C. M. 1871 *In re* Beaumont's Mortgage Trusts.

Sir R. Malins, V.C.:—

My opinion is, that the Act was intended to include mortgagees. It begins by reciting, that "Whereas trustees and others, in the intended exercise of trusts or powers authorizing them to dispose of land by sale, exchange, partition, or enfranchisement, have disposed of land subject to such trusts or powers, with an exception or reservation of minerals." Now, I am at a loss to understand why "others" should not include mortgagees, and I think it should be held to do so.

Then the Act provides, by sect. 2, that "Every trustee and other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement, may, unless forbidden by the instrument creating the trust or power, so dispose of such land, with an exception or reservation of any minerals."

I am therefore of opinion that every mortgagee standing behind another mortgagee is bound to know that the prior mortgagee may sell the land comprised in the security, with an exception of the minerals. The order will therefore be as prayed.

Solicitors: Messrs. *Gadsden & Treherne.*

KIDD *v.* BOONE.

V.-C. B.
1871
April 27.

Administration—Specialty Debt—Arrears of Interest accrued due since Testator's Death—Bond—Liability under an Agreement by Deed to enter into a Covenant to pay Rent and make Repairs.

By an agreement under seal, *E.* covenanted with *B.*, his executors and administrators, that he would at any time thereafter, at the request of *B.*, his executors, administrators, or assigns, execute a demise of certain freeholds for the term of twenty-one years, at the yearly rent of £180, which lease should contain a covenant to keep the premises in good and substantial repair, and all other usual covenants; and *B.* thereby, for himself, his executors, or administrators, covenanted with *E.*, whenever thereto requested by *E.*, to accept such lease, and execute a counterpart thereof.

Under this agreement *B.* entered and paid rent until his death (which took place before the 1st of January, 1870), and after his death his widow and legal personal representative entered and paid rent. No lease was ever executed, and no such request, as above-mentioned, was ever made by either party. Since *B.'s* death rent had accrued due, and a sum was required for repairs:—

Held, that the liability under the deed was from the first, and still was, a specialty; hence, that a claim by *E.* for the sums due for arrears of rent and dilapidations under the covenants agreed to be entered into by *B.* were debts by specialty against his estate.

Whether an arrear of rent accruing due after the death of a lessee by lease or parol (dying before the 1st of January, 1870), ranks as a specialty debt against his estate, *quære*.

THIS was a claim by *William Henry Evans*, in answer to the usual advertisement for creditors, which had been issued by the Chief Clerk after a decree in the suit, which was a creditors' suit for the administration of the estate of *Edward Boone*, deceased.

The estate was insufficient to pay creditors in full; and the object of the claimant was to have the claim allowed as a specialty debt.

Prior to the 13th of April, 1859, a partnership existed between *Edward Boone*, the testator, and *Edward Evans*, as ironmongers, at *Neath*. *Edward Evans* died on that day intestate, and administration was granted to his brother, *W. H. Evans*, the claimant.

By a bond, dated the 30th of September, 1860, *Edward Boone*, the testator, became bound to *William Henry Evans*, the claimant, in the penal sum of £6356 4*s.* 8*d.*, the bond being conditioned to be void if *Boone*, his heirs, executors, or administrators, should pay or cause to be paid to *Evans*, his executors, administrators, or assigns,

V.-C. B. 1871 KIDD v. BOONE.

the sum of £2678 2*s.* 4*d.*, on the days, times, and in manner following: that is to say, £500 on the 1st of February, 1861; £500 on the 1st of August, 1861; £500 on the 1st of May, 1862; £500 on the 1st of May, 1863; and £678 2*s.* 4*d.* on the 1st of May, 1864; with interest on the £2678 2*s.* 4*d.*, or so much thereof as should from time to time remain due, at the rate of £5 per cent., to be paid half-yearly on the 30th of March and the 30th of September in each year, so long as any such interest should continue payable, the first payment to be made on the 30th of March then next ensuing; and if *Boone*, his heirs, executors, or administrators, should also pay to *Evans*, his executors, administrators, or assigns, on the 1st of May, 1865, the further sum of £500, with interest thereon from the date of the bond, at the rate aforesaid. If default should be made in payment "of any one of such instalments, or of any part of any one of such instalments, or of any portion of such interest as aforesaid," for the space of one calendar month after the same should have become due, then the bond was to be in full force and virtue, and the whole of the principal sum of £3178 2*s.* 4*d.* (or of so much thereof as should not have been previously paid off and discharged), together with the interest accrued due in respect thereof, was forthwith to become due and payable to *Evans*, his executors, administrators, or assigns. It was provided that in case the £2678 2*s.* 4*d.* and interest should have been duly paid by *Boone*, his heirs, executors, or administrators, to *Evans*, his executors, administrators, or assigns, by the instalments and at the times thereinbefore appointed, then the £500 so appointed and agreed to be paid on the 1st of May, 1865, and interest, was to be given up and relinquished by *Evans*, his executors, administrators, or assigns, to *Boone*, his heirs, executors, or administrators, and the bond was to be forthwith given up to him to be cancelled.

By a deed of arrangement entered into on the same day between the same parties, after reciting, amongst other things, that a settlement of accounts had recently been come to between them, at which it was agreed by and between them that *Evans* should purchase and take to the share and interest of *Boone* in certain freehold hereditaments and premises at *Neath* (which formed part of the assets of the partnership) and fixtures at the

price of £1600, of which £1200 should be retained by *Evans* for the purpose of paying off a mortgage debt, and £400 should be retained by *Evans* in part payment and satisfaction of the sum of £3578 2*s.* 4*d.* after mentioned; and that *Boone* should pay to *Evans* as such administrator as aforesaid, for the purchase of the stock-in-trade and fixtures, and in satisfaction and discharge of all moneys advanced by *Edward Evans* for the purchase of the freeholds and fixtures, and the erection of buildings thereon, over and above his proper proportion of the outlay made for those purposes, the sum of £3578 2*s.* 4*d.*, towards which the aforesaid sum of £400 should be retained and applied by *Evans* (the claimant); and that the payment by *Boone*, his executors and administrators, of the balance of £3178 2*s.* 4*d.* by certain instalments thereinafter mentioned should be secured by bond, "with a condition nevertheless that the last instalment of £500 part thereof shall be given up and relinquished in the event of the prior instalments with interest thereon being duly paid;" and also reciting the above-mentioned bond, and that it had been executed previously to the execution of the then present indenture; it was witnessed (amongst other things) that it was thereby agreed and declared between the said parties, and *W. H. Evans*, thereby, for himself, his heirs, executors, administrators, and assigns, covenanted with *Boone*, his heirs, executors, and administrators, that in case *Boone*, his heirs, executors, or administrators, should well and truly pay to *Evans*, his executors, administrators, or assigns, the said sum of £2678 2*s.* 4*d.*, secured by the above-mentioned bond, upon or at the days or times by the bond appointed, or within one calendar month thereafter, with interest as in the bond provided, the sum of £500 so as aforesaid appointed to be paid by *E. Boone* to *Evans* on the 1st of May, 1865, and the interest thereof, should not be payable, and *Evans*, his executors, administrators, or assigns, should not enforce payment thereof respectively, and should release *Boone*, his heirs, executors, and assigns from the payment thereof respectively, and should deliver up the bond to *Boone*, his heirs, executors, or administrators, to be cancelled. And it was further witnessed that *W. H. Evans* thereby, for himself, his heirs, executors, and administrators, covenanted with *Boone*, his executors and administrators, that he, *Evans*, his heirs or assigns, would at any time thereafter, at the request and

V.-C. B. 1871 KIDD v. BOONE.

expense of *Boone*, his executors, administrators, or assigns, execute a valid and effectual demise of all and singular the said freehold hereditaments to *Boone*, his executors, administrators or assigns, for the term of twenty-one years, to be computed from the 29th of September then instant, at the yearly rent of £180, payable half-yearly, "which said lease shall contain a covenant to keep the said buildings and premises in good and substantial repair during the said term, and shall contain all other covenants and stipulations usual in leases of a like nature." And *Boone*, for himself, his executors or administrators, thereby covenanted with *Evans*, his heirs and assigns, whenever thereto requested by *Evans*, his heirs or assigns, "to accept such lease, and to execute a counterpart thereof."

From the date of this bond and deed, *Boone* entered into possession of the freeholds, and remained in possession of them as tenant from year to year upon the terms of the above covenant until his death, which took place on the 30th of April, 1869. Afterwards his widow and legal personal representative entered into possession, and so remained until the date of the order below mentioned, but no rent had been paid since Lady Day, 1869.

Boone did not pay any of the stipulated instalments on the days and in the manner pointed out by the bond; but he paid the following sums: viz., on the 22nd of February, 1861, £500; on the 19th of October, 1861, £500; on the 29th of November, 1862, £250; on the 26th of May, 1863, £250; on the 23rd of January, 1864, £178; on the 27th of February, 1864, £178 2*s.* 4*d.*; on the 13th of May, 1864, £143 17*s.* 8*d.*; on the 7th of November, 1864, £178 2*s.* 4*d.*; on the 26th of November, 1866, £100; and on the 26th of February, 1867, £100. These payments amounted together to £2378 2*s.* 4*d.*, being £300 short of the £2678 2*s.* 4*d.*

Under the above circumstances a threefold claim was made: first, for the arrears of rent; secondly, for a sum of £310 in respect of the want of repairs, for the execution of which the lease was to have contained a covenant, as above stated; and, thirdly, for a sum of £800, being the £300 unpaid as above (upon which £16 5*s.* was also demanded for interest from the 30th of September, 1868), and the final instalment of £500 stipulated for by the bond in case the instalments were not regularly paid (upon which £227 1*s.* 8*d.* was demanded for interest from the 30th of September, 1860).

With reference to the latter branch of the claim, several documents coming out of the possession of the testator's widow were put in evidence. One in particular was a memorandum, dated "*Neath*, 5/1/55," in the handwriting of *Edward Evans*. This paper was inclosed in an envelope addressed to *William H. Evans*, and indorsed with the words, "Only to be opened in case of my not returning from *Norway*." It was in the form of a letter to the claimant, and began thus: "As in the event of my dying without a will all my property will devolve upon thee, I leave, as below, a few memoranda of what I should wish thee to do with a part of it." Then followed a number of appropriations of various sums, amongst which was the following: "£500 I should wish given to my partner and cousin, *E. Boone*."

Extracts were also read from a long correspondence which passed between *Edward Evans* and *Boone*, but in the result they were not considered by the Court to be of importance to the decision.

The Chief Clerk, on the 23rd of March, 1870, made a memorandum that the Defendant, the widow, was to be at liberty, in pursuance of an order of the 29th of September, 1869, to deliver up possession of the premises to the claimant on the 25th of March, 1870; the claimant, by his solicitor, waiving any claim for rent subsequent to that day; but such delivery was to be without prejudice to any question on the claim.

The claim, to the extent of the £300 remaining unpaid out of the instalments, was not disputed.

Mr. *Willcock*, Q.C., and Mr. *James G. Wood*, for the claimant:—

That an arrear of rent for land demised, whether by deed or parol, is of equal degree with specialty debts appears from the judgment of Baron *Wood* in the Exchequer: *Thompson* v. *Thompson* (1), followed by *Clough* v. *French* (2), and *Vincent* v. *Godson* (3); and that the holding under this agreement was originally a tenancy at will, converted by payment of rent into a tenancy from year to year, is shewn by *Chapman* v. *Towner* (4); *Brashier* v. *Jackson* (5).

(1) 9 Price, 464, 471.
(2) 2 Coll. 277.
(3) 4 D. M. & G. 546, 551.
(4) 6 M. & W. 100.
(5) 6 M. & W. 549.

V.-C. B. 1871 KIDD v. BOONE.

Independently of the rule of law, we have here a special agreement to covenant to pay this rent. An agreement under seal to give a security which would create a specialty debt itself creates a specialty debt: *Saunders* v. *Milsome* (1).

The like reasoning applies to the dilapidations.

With regard to the £800, the liability of the estate to the extent of the £300 is not disputed. As to the £500, the event, on the occurrence of which the liability was to arise—viz., the non-payment of the instalments—has arisen, and the liability has never been waived.

Mr. *Kay*, Q.C., and Mr. *Renshaw*, for the Plaintiff, representing the simple contract creditors:—

We admit that, under a tenancy acquired by mere occupation and payment of rent, arrears of rent fallen due in the lifetime of a testator rank as a specialty against his estate, but it is otherwise as to rent which has accrued since his death, during the occupation of his representatives. This appears from *Wentworth's* Office and Duty of Executors (2).

(1) Law Rep. 2 Eq. 573, 575.

(2) 14th Ed. 1829, by Jeremy, pp. 284, *et seq.*

The whole passage is as follows:—

"Now between a debt by obligation and a debt for rent or damages upon a covenant broken, I conceive no difference, nor any priority or precedency; but it is at the executor's discretion to pay first which he will, as if all were by bond (12). So also of rents behind and unpaid, as I conceive; but touching them, principally intending rents upon leases for years, divers considerations are to be had, and some distinctions to be made. As first, between rent behind at the time of the testator's death, of which *that* before said is to be understood, and *that* which groweth behind, after; next, between suit for the rent by action of debt, and distress, and avowry. As to the first difference, if the rent grew due since the testator's death, then is it not accounted in law the testator's debt; for only so much is in law accounted assets to the executor as the profits of the lease amounted to over and above the rent (1); so as

"(12) Com. Dig. Adm. c. 2; Salk. 326; Cro. El. 232; 3 Burr. 183, 1384; 1 P. Wms. 429. And whether the lease be by deed or parol, it is immaterial; for the debt arises from the profits of land, and is therefore considered as a specialty debt . . ."

(1) The marginal note here is: "Cro. Jac. 238. *Lord Rich* v. *Frank*, administrator, for rent due after the death of intestate; adjudged, upon motion in arrest of judgment, that the action well lay in the *debet* and *detinet*: Pas. 8 Jac. B. R.; though the like judgment in B. R., in the case of *Body* v. *Hargrave*, given Mich. 41 Eliz., was afterwards reversed in Camerâ Scacc. Cro. El. 711; and see 1 Salk. 297, 317."

Moreover, the agreement here was a qualified one. The covenant is to execute a counterpart "whenever thereto requested" by *W. H. Evans*. No request has yet been made; and if it were made now, the lease could not be antedated.

An action upon the covenant could be brought only on a declaration, which must contain an allegation incapable of proof.

As to the bond, it must be taken as part of the deed of arrangement; and the claimant, by taking small instalments, must be held to have condoned the payment of the £500, which, though not strictly a penalty, must be regarded in the light of one.

The letters also prove a condonation.

In administering an estate the Court regards the legal rights. Upon this covenant an action cannot be brought; hence the claim is not a specialty. In *Wynch* v. *Grant* (1), Vice-Chancellor *Kindersley* observes: "This Court does not take a view different from the law as to what constitutes a specialty debt. There is no such thing as an equitable covenant if there is not a legal covenant."

In *Isaacson* v. *Harwood* (2), a defaulting trustee executed a mortgage, without a covenant to pay interest, and the deed was held not to have created a specialty debt.

In *Holland* v. *Holland* (3) Lord Justice *Giffard* observed (4), that to make a debt a specialty it must be enforceable at law; there was no specialty in equity. So again, in the judgment (5): "It has been suggested that there may be such a thing as a

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for *that* rent so behind the executor himself stands debtor, as hath been resolved, and therefore he is suable in the *debet* and *detinet*; whereas for rent behind in the testator's life, and all other the debts of the testator, he must be sued in the *detinet* only. Hence it must follow, as it seems, that an executor, sued for debt upon a bond or bill, cannot (except in some special cases) plead a payment or recovery of rent grown due since his testator's death; though of rent behind at the time of his death it be otherwise. And yet here, again, another difference or distinction is to be taken, viz., where the profits of the lease exceed the rent, and where the rent is greater than the yearly value of the profits; for even there, as elsewhere is showed, the executor, if he have assets, is tied to the holding of the lease, and payment of the rent, and consequently doth so much of that rent as exceeds the yearly profit stand in equal degree the testator's debt, with other debts by specialty."

(1) 2 Drew. 312, 317.
(2) Law Rep. 3 Ch. 225.
(3) Ibid. 4 Ch. 449.
(4) Ibid. 455.
(5) Ibid. 459.

V.-C. B. 1871 KIDD v. BOONE.

specialty in equity which is not a specialty at law; but I do not hesitate to say in the plainest possible language that if there be not a specialty at law, and not such an instrument as that an action at law can be maintained upon it, this is not so; all equitable debts rank *pari passu*, and there is no distinction between one description of equitable debt and another."

As to the bond, it appears that as far back as 1855 the present claimant's testator wished by that document, which was meant to be a will, to give to his partner and cousin, the testator in the cause, £500; and this is the sum which the claimant now desires to have paid to himself out of the testator's estate. Time was not of the essence of the contract; if and whenever the instalments should be paid the £500 was to cease to be payable.

Mr. *Freeling*, for the Defendant, the widow and representative of the testator.

SIR JAMES BACON, V.C.:—

I am quite satisfied as to the claim for the £500.

It is plain that the sums were not duly paid; they have not even yet been wholly paid; how then can it be said that there has been any waiver or release of the liability? No doubt great forbearance was from time to time shewn by the obligee; but merciful consideration on his part is not to deprive him of those benefits to which he was entitled under the bond.

Mr. *Willcock*, in reply on the other points:—

In *Isaacson* v. *Harwood* (1), there being no covenant, all that Lord *Cairns* decided was, that it was not in that instance the intention of the parties that the agreement should amount to a covenant. In *Holland* v. *Holland* (2), again, there was no covenant whatever.

The argument turning on the want of request is answered by *Saunders* v. *Milsome* (3).

SIR JAMES BACON, V.C.:—

Upon the first point—that of the rent—I cannot say I think the question is settled by the citation from *Wentworth* on Executors. [His Honour read the passage extracted above, and added:—]

(1) Law Rep. 3 Ch. 225. (2) Law Rep. 4 Ch. 449.
(3) Law Rep. 2 Eq. 573.

Wentworth on Executors is, no doubt, a most valuable authority, but I think the passage to which I have referred leaves the distinction which has been contended for before me very much in the dark.

In my view, the true question to be decided is, whether the effect of the deed of arrangement is to constitute a debt by which the testator's estate is bound, as by a specialty. [His Honour read the provisions of the deed bearing upon the point, and observed:—] The meaning of that is, that if on the day on which the deed was executed, or the day after, the obligor had required the obligee to execute the counterpart of a lease containing the specified covenants, he could have been compelled to do so.

The cases which have been referred to seem to me to have no application to the present. In *Wynch* v. *Grant* (1) the deed contained no acknowledgment of debt and no engagement to pay. In *Isaacson* v. *Harwood* (2), Lord *Cairns*, upon a review of all the circumstances of the case, thought that as no covenant had been inserted in the deed there was no desire on the part of the parties to fix the mortgagor with a specialty obligation. And although Lord Justice *Giffard* in *Holland* v. *Holland* (3) uses expressions which from their general nature might seem to bear on the present case, I think those expressions, however just and reasonable when applied to the facts then before the Court, cannot govern a different state of circumstances, and do not affect the question before me.

An engagement under seal is in its nature a specialty; and although it may now be impossible to enforce specific performance of the agreement, I must nevertheless hold that all liability which ever existed under this instrument commenced from the day on which the contract under seal was executed, and which then might have been ordered to be specifically performed, and that it then was, and now is, a liability of the nature of a specialty.

The claim must, therefore, be allowed. The costs of all parties will come out of the estate.

Solicitors for the Claimant: Messrs. *Rogerson & Ford.*
Solicitors for the Plaintiff: Messrs. *Walters & Gush.*
Solicitors for the Defendant: Messrs. *Vizard & Co.*

(1) 2 Drew. 312. (2) Law Rep. 3 Ch. 225.
(3) Law Rep. 4 Ch. 449.

V.-C. B.
1871
May 25.

FARHALL *v.* FARHALL.

Administration—Executorship Account.

A. being indebted at his death to a bank in a sum, as a security for which he had deposited with them the title-deeds of an estate, by his will empowered his executors to charge his real estates in aid of his personal estates. On application by *A.'s* widow and sole executrix *B.* to draw on her late husband's account, the bank refused to honour cheques drawn by her in her personal character; but opened an account intituled "*A.'s* Executors' Account," and honoured cheques upon it signed "*B.*, for executors of *A.*" Of the moneys drawn out from time to time the bulk was applied by *B.* for the personal expenses of herself and her children, and in various speculations with regard to the purchase, sale, and farming of land. The amount due to the bank having increased greatly since *A.'s* death, and the estate comprised in the security held by them being insufficient when realised to satisfy the debt:—

Held, that the bank were entitled to prove against the general estate of *A.* for the balance due to them in respect of the sums drawn out by *B.* on the executorship account.

Reversed by 1 J & H 276 Ch 123

ADJOURNED SUMMONS upon a claim by the *London and County Banking Company* to be admitted as creditors on the general estate of the testator, *Richard Farhall*, for £987, being the balance of principal found due to them by an order (of Vice-Chancellor *James*) of the 23rd of January, 1869, after deducting the amount realised by the sale of real estates of the testator, which were specifically charged with payment of such principal money, and interest thereon, together with interest at 5 per cent. on the £987 from the 17th of August, 1869. The claim also included the costs, charges, and expenses of the bank (taxed at £174 3s.) in relation to their security, and to their claim mentioned in the order of the 23rd of January, 1869.

The case upon the previous claim, on which the order of the 23rd of January, 1869, was made, is reported (1).

The testator, *Richard Farhall*, was a customer of, and indebted at his death, in December, 1861, to the *London and County Bank* in the sum of £732, for which they held as security the title-deeds of a portion of his real estates. By his will his executors were

(1) Law Rep. 7 Eq. 286.

empowered to charge his real estates in aid of his personal estate. *Mary Farhall*, his widow, who, as executrix, had alone proved his will, immediately after his death applied to the bank to allow her to draw on her late husband's account; but Mr. *Osborn*, the manager (as stated in his affidavit, which was uncontradicted), refused to honour a cheque drawn by her in her personal character. On being referred by the widow to Mr. *Geoghegan*, one of the executors and a solicitor, the manager was informed by *Geoghegan* that Mrs. *Farhall* was the only one of the executors who would prove the will, and that she could draw cheques on account of the testator's estate. The bank thereupon opened an account, entitled "*Richard Farhall's* Executors' Account," and cheques upon it, signed "*Mary Farhall*, for executors of *Richard Farhall*," were honoured.

Considerable sums were from time to time paid into this account, and much larger sums drawn out; and as a security for the increased amount due, Mrs. *Farhall* deposited the title-deeds of another portion of the testator's real estates. With regard to the application of the moneys so drawn out by her, Mrs. *Farhall*, in her affidavit, stated: "From the death of the testator, in 1861, up to the time that my account with the *Petworth* branch of the *London and County Banking Company* was closed in December, 1866, I expended for my own purposes, and in various speculations with regard to the purchase, sale, and farming of land, large sums of money. I did not keep any regular account of the moneys so received and paid by me on such transactions, but the same resulted in a loss of a very considerable sum of money."

A bill having been filed to administer the estate, a decree was made on the 26th of January, 1867, directing the usual accounts and inquiries. Under this decree the bank claimed to prove against the testator's estate for the balance of £2593 17*s.* 1*d.* upon the whole amount, including both the debt due from the testator at his death, and the subsequent transactions of the widow on the executorship account. After this claim was carried in, an order was made by consent in May, 1868, "without prejudice to any question between the bank and the estate of the testator," for the sale of the estates, and payment out of the proceeds of the £732 (admitted to be due to the bank from the testator at the

V.-C. B. 1871 FARHALL v. FARHALL.

time of his death), with an inquiry as to what was due to the bank over and above that sum.

On the 23rd of January, 1869, the claim of the bank came on to be heard, and Vice-Chancellor *James* ordered that the claim of the bank to rank as incumbrancers on the real estate of the testator comprised in the title-deeds deposited by the testator and by his executrix respectively with the banking company as security (as mentioned in the affidavit of *Osborn*, the manager of the bank), for the principal sum of £1861 14*s.* 10*d.*, with interest thereon at 5 per cent., in addition to the principal sum of £732, and not mentioned in the order of May, 1868, and for any costs, charges, and expenses properly incurred in relation to such security or the realisation thereof, and of the application, be allowed (see *Farhall* v. *Farhall* (1).

The sum claimed by the bank had since been reduced by sale of the remaining portion of the testator's estates comprised in the securities held by the bank; but the proceeds of the sale being insufficient for payment of the whole amount, the bank now claimed to be admitted as creditors on the general estate of the testator for the balance of £987 remaining unpaid.

Mr. *Kay*, Q.C., and Mr. *Waller*, in support of the claim:—

When money is paid to the use of a person in his character of executor, the person who has made that payment is entitled to sue the executor in his representative capacity, and to recover judgment *de bonis testatoris*: *Ashby* v. *Ashby* (2); and even in cases where at law the remedy would be against the executor personally, the estate of the testator remains liable in equity.

Mr. *Fry*, Q.C., and Mr. *Ince*, for the Plaintiff:—

The bank has no claim in respect of this balance against the general personal estate of the testator, either at law or in equity. It is not the case of money paid to satisfy debts of the testator, but of money lent to the executor, and the cases at law shew that whenever money is advanced to an executor, notwithstanding his promise "as executor" to pay, he is personally liable, and judgment will be recovered *de bonis propriis*: *Rose* v. *Bowler* (3);

(1) Law Rep. 7 Eq. 286. (2) 7 B. & C. 444.
(3) 1 H. Bl. 108.

Childs v. *Monins* (1); *Ridout* v. *Bristow* (2); *Corner* v. *Shew* (3); though where it is shewn that the estate has got the benefit of the advance, then the judgment may be *de bonis testatoris: Powell* v. *Graham* (4); *Ashby* v. *Ashby* (5); *Williams* on Executors (6). So in equity, no one is allowed to prove against the estate of the testator in respect of money advanced to the executor, unless the advance has been for the purpose of paying off a debt of the testator; and even in such a case, although the person making the advance might be entitled to stand in the place of the creditor so paid as against property still remaining in the hands of the executor, he cannot follow the property of the testator which has been aliened by the executor for his own purposes or benefit: *Haynes* v. *Forshaw* (7).

Here the bank has only proved the simple fact of an advance of money to Mrs. *Farhall*, who called herself executrix, and therefore the case falls within *Rose* v. *Bowler* (8), and has not been brought up to *Ashby* v. *Ashby*.

Mr. *Kay*, in reply.

SIR JAMES BACON, V.C.:—

The common law cases which have been referred to, especially *Ashby* v. *Ashby*, only recognise the plain rule that a demand may exist against an executor *de bonis testatoris*, and may also exist against him *de bonis propriis*. It depends on the form in which the declaration is drawn, whether the Plaintiff is pursuing one remedy or the other. *Ashby* v. *Ashby*, so far as it decides anything which was then before the Court, decides that the two causes of action cannot be united in one declaration. That there may be a right to proceed against the goods of the testator by reason of transactions with the executor is nowhere exposed to the slightest doubt by any decision, either at law or in equity. When the reason of it is considered, one of the powers of the executor is to pledge—to do what lawfully he will with—the whole of the testator's estate,

(1) 2 Brod. & B. 460.
(2) 1 C. & J. 231.
(3) 3 M. & W. 350.
(4) 7 Taunt. 581.
(5) 7 B. & C. 444.
(6) 6th Ed. p. 1636, *et seq.*
(7) 11 Hare, 93, 104.
(8) 1 H. Bl. 108.

V.-C. B. 1871 FARHALL v. FARHALL.

and applying that state of things to the circumstances of this case, it seems as well in fact as at law to be beyond question. [His Honour referred to the affidavit of the bank manager, which, as he said, remained wholly without challenge or contradiction.] The judgment of Vice-Chancellor *James*, which has been referred to, was pronounced with that evidence before him; and Mrs. *Farhall's* affidavit does not call any of those facts in the slightest degree in question. After stating that as such executrix she continued her account with the bank, she further says, respecting her own transactions: "From the time of the death of the testator, in 1861, up to the time that my account with the said *Petworth* branch of the bank was so closed, as aforesaid, in December, 1866, I expended for my own purposes, and in various speculations with regard to the purchase, sale, and farming of land, large sums of money. I did not keep any regular account of the moneys so received and paid by me on such transactions, but the same resulted in the loss of a very considerable sum of money." That is all the explanation that is given. "For my own purposes," might be "for my own purposes as executrix." She is unable to give any account, and I am asked to decide on such a transaction as this, that if it was an action at law, the creditors could not succeed, as in *Ashby* v. *Ashby* (1). It is admitted that they might have succeeded in a certain form of pleading to recover *de bonis propriis* the debt, which was there alleged to be due. I do not think there is any such principle in any of the authorities referred to. The case of *Haynes* v. *Forshaw* (2) points directly the contrary way; but certainly I have not gathered from that case, nor from any other case, that a banker dealing with an executor in good faith, and for purposes which appear to be connected with the testator's estate, is bound to ascertain that every sum which he permits to be drawn for upon him is to be applied in payment of a debt due from the testator. From the nature of the testator's property there might have been payments properly made for debts due from the testator in his lifetime. In my opinion, the right of the creditors having been established by the judgment of the Vice-Chancellor as to the real estate, and there being a deficiency of £987 upon the balance, they are entitled to prove, as the summons asks, for the sum of £987,

(1) 7 B. & C. 144. (2) 11 Hare, 93.

and the costs which have been incurred in realising that security which the former judgment of Vice-Chancellor *James* established.

V.-C. B.
1871
FARHALL
v.
FARHALL.

Solicitors: Messrs. *Stevens, Wilkinson, & Harries;* Messrs. *Stephens & Matthews.*

BURKINSHAW *v.* WILSON.

V.-C. B.
1871
June 1.

Practice—Dismissal of Bill—Amendment—Motion to restore.

After the expiration of the fourteen days within which to file replication, limited by the usual order to speed, Plaintiff moved to restore the bill, on the ground that he, by a mere slip, had not asked that the order to speed should include the alternative of amending his bill (in which case, by the intervention of a vacation, the time would not have been run out). The application was refused.

THIS was a motion on behalf of the Plaintiff that, notwithstanding that he did not file replication within fourteen days from the date of the order made in this cause on the 4th of May, 1871, his bill might be restored to the file of this Court.

The bill was filed on the 10th of September, 1870, for the purpose of obtaining a dissolution of the partnership carried on between Plaintiff and Defendant from October, 1866. The answer was filed on the 20th of December, 1870. On the 1st of May, 1871, notice of motion on behalf of the Defendant to dismiss for want of prosecution was served on Plaintiff. On the 4th of May the motion came on, and upon an undertaking by the Plaintiff to speed, the Court made no order except that Plaintiff should pay the costs of the motion. The Plaintiff, by a slip, omitted to ask that the undertaking should give the option of amending. The Plaintiff's solicitor received no notice of the settling of the draft of the order of the 4th of May until the 22nd of May, when he attended at the Registrar's office, and obtained the draft of the order, which directed that if within fourteen days Plaintiff did not file replication the bill should be dismissed with costs. Plaintiff's solicitor objected to the form of the order, insisting that Plaintiff was entitled to have fourteen days within which to obtain an order to amend his bill, or to file replication.

On the 23rd of May the order was passed by the Registrar in the form in which it was prepared.

V.-C. B. 1871 BURKINSHAW v. WILSON.

On the 24th of May a clerk of Plaintiff's solicitor was sent to file replication, but on the same afternoon notice was received from Defendant's solicitors that they had marked the bill as dismissed; and on the following day the replication was returned to Plaintiff's solicitor by the Clerk of Records and Writs in consequence of the bill having been marked as dismissed. The draft of the proposed amendments had been settled and signed at the time when the motion of the 4th of May was made, but as the Plaintiff required some further amendment to be made consequent upon an inspection of documents, for which notice of motion for the 22nd of May had been served, an order to amend was not applied for. If the order of the 4th of May had provided for the amendment of the bill, the Defendant could not have dismissed the same on the 24th of May, as the time for amending would not have run during the Whitsun Vacation (10th–22nd of May).

Mr. *Lindley*, and Mr. *O. L. Clare*, for Plaintiff, in support of the motion, contended that, as the suit was a *bonâ fide* suit, which it was intended to prosecute after amending the bill, Plaintiff ought not to be shut out by a mere slip in not applying for leave to amend when the order of the 4th of May was made, and that the proper form of motion was to have the bill restored: *Bartlett* v. *Harton* (1); *Southampton Steamboat Company* v. *Rawlins* (2); *Daniell's* Chancery Practice (3).

Mr. *Fry*, Q.C., and Mr. *W. Pearson*, for the Defendants, were not called upon.

SIR JAMES BACON, V.C., said that the motion could not be granted. The Plaintiff was prepared to amend his bill, but had not done so. When the motion to dismiss was made, the Plaintiff should have stated that he wished to amend, and asked for the order to be made in that form. By a blunder, or some unintentional slip on his part, he had not done so, and the mistake could not now be rectified. The motion must be refused with costs.

Solicitors: Messrs. *Neal & Philpot;* Messrs. *Denton, Hall, & Barker.*

(1) 17 Beav. 479. 17 Jun 1019. (2) 13 W. R. 512. 17 Jun 1[illegible]

(3) 5th Ed. p. 711, 712.

RADFORD *v.* WILLIS.

V.-C. W.
1871
May 24, 30.

Will—Trust—Gift to unmarried Daughters for Life—Gift to Daughter's Husband, whether limited to present Husband—Title—Specific Performance.

Testator gave his estates, and the rents thereof, upon trust for his two daughters *A.* and *L.*, to receive the same equally as tenants in common for their lives, independent of the control of any husband or husbands with whom they might intermarry; and after the decease of his daughters, he directed that the trustees should stand seised of the estates, and convey the whole thereof unto the respective husbands of his daughters, provided that if either daughter should die unmarried the share of such daughter should accrue and belong to the survivor for life, and on her decease the whole should devolve to and be conveyed to her husband. *A.* died leaving a husband surviving. *L.* married *P.*, who by will gave to his wife all the estate to which he was entitled under the will of her father absolutely. *P.* died leaving his wife surviving. The Defendant at an auction purchased three lots of the estates, but refused to complete on the ground that *P.* was not entitled to an absolute interest in remainder on the death of *L.* On demurrer to a bill for specific performance :—

Held, that, if *L.* should leave a husband surviving, his claim to the estate would be a good one, and that the title of *L.* was not such as could be forced on a purchaser.

Demurrer allowed.

Reversed by L.J. L.R. 7 Ch. 7.

DEMURRER.

Thomas Draper, who died in March, 1832, by will, in January, 1831, after directing the conversion and investment of his personal estate, and bequeathing the same to trustees, devised and bequeathed all his freehold and leasehold hereditaments and premises unto the same trustees and the survivor of them, and the heirs, executors, and administrators of such survivor, and directed that his trustees and the survivor of them, and the heirs, executors, and administrators of such survivor, should stand seised and possessed of and interested in all and singular his freehold and leasehold estates, stocks and funds, and the rents, issues, and profits thereof, and the income of his personal estate, "upon trust, in the first place, to pay to or otherwise permit and suffer my dear daughters *Ann Draper* and *Lucy Draper* to have, take, receive, and enjoy the same in equal shares and proportions to and for their and each of their own proper use and benefit in equal parts, shares and

V.-C. W. 1871

RADFORD v. WILLIS.

proportions as tenants in common, and not as joint tenants, for and during the term of their own respective natural lives, wholly independent of the control, management, or interference in anywise howsoever of any husband or husbands with whom they or either of them may happen to intermarry, and without the same being in anywise subject or liable to the debts, liabilities, or engagements of their or either of their said husbands; and from and after the respective decease of my said daughters, I do hereby further will, order, declare, and direct that they my said trustees and the survivor of them, and the heirs, executors, or administrators of such survivor, shall stand seised, possessed of, and interested in all and singular the said freehold and leasehold estates, trusts, stocks, funds and securities, and the rents, dividends, and proceeds thereof, upon trust to convey and assure, assign, pay, and transfer the whole thereof unto and equally between the respective husbands of them my said daughters, to hold to them respectively, and their respective heirs, executors, administrators, and assigns, according to the several natures and qualities thereof respectively: provided always, that if either of my said daughters shall happen to depart this life unmarried, then and in such case the share of such daughter in and to my aforesaid trust estate and premises, stocks and funds, and securities, shall accrue and belong to the survivor of them my said daughters, and be taken and enjoyed by her for her life, in like manner as is before directed with respect to her original share, and on her decease the whole shall devolve to and shall be conveyed and assured, assigned, and transferred to the husband of my said surviving daughter, as is hereinbefore directed with regard to her said original share."

Ann Draper married *William Radford* in March, 1831, and died in his lifetime, in February, 1868; and *Lucy Draper* married *Daniel Pearce* in September, 1832. *Daniel Pearce*, who died in March, 1868, by his will, in April, 1833, after reciting that under and by the will of *Thomas Draper* he was entitled, as the husband of *Lucy Pearce*, to one moiety absolutely of and in all the real estate and residue of the personal estate of *Thomas Draper* devised and bequeathed unto *Lucy Pearce* all his estate, right, title, and demand to which he was entitled, either in possession, reversion, remainder, or expectancy under or by virtue of the will

of *Thomas Draper*, to hold the same unto *Lucy Pearce*, her heirs, executors, and administrators absolutely.

William Radford, who died in April, 1869, by his will, in July, 1868, after reciting that he was possessed of certain freehold and leasehold property, jointly with *Lucy Pearce*, declared it to be his wish that the same should remain in its then state of investment, and gave the rents to his sons equally until the property should be sold. He directed his trustees to join in any conveyance, and disposed of the proceeds amongst his sons.

In January, 1871, three lots of this property were sold by auction to the Defendant *Thomas Willis*, and he, after receiving an abstract of title, raised an objection that *Daniel Pearce* was not entitled to an absolute estate in fee in remainder expectant on the decease of *Lucy Pearce* in a moiety of this property, but that such moiety would either vest solely in the person (if any) who at the decease of *Lucy Pearce* should be her husband, or in such person jointly with *Daniel Pearce*, and declined to complete his purchase.

The Plaintiffs—the vendors, the trustees of the will of *William Radford*, and *Lucy Pearce*—prayed for a declaration that, according to the true construction of *Thomas Draper's* will, one moiety of the property vested in *Daniel Pearce* for an absolute estate in fee in remainder expectant on the death of *Lucy Pearce*, and that the Defendant might be decreed specifically to perform his agreement on the footing of the above declaration, and ordered to pay the costs of the suit. The Defendant demurred.

Mr. *Dickinson*, Q.C., and Mr. *Shebbeare*, for the Defendant:—

No doubt everything was well devised. The objection of the Defendant to the title of *Lucy Pearce* is, that if she marries again, and her husband should survive her, he—the second husband—would have an interest in the property. The testator devised to trustees the fee, with a direction to do something which would vest the property in a particular person at a particular time, and the husband of a daughter could not in the lifetime of his wife have required the trustees to convey to him, because that they were not directed so to do by the will. It may be said that the testator could not have intended to give the property to a second husband, for if there had been children of the first marriage, they must be provided

V.-C. W. 1871 RADFORD v. WILLIS.

for; but supposing there should have been that circumstance, still effect must be given to the words of the will. In *Peppin* v. *Bickford* (1) there was a gift to the wife of *A.*, who was not married till after the death of the testator, and it was held to extend to a second wife. The case of *Franks* v. *Brooker* (2) was a gift to daughters and their respective husbands, and it was held that the latter gift was confined to existing husbands, but the Master of the Rolls came to that conclusion, not without some doubt (3), notwithstanding the names of the husbands were referred to. Practically, that case supports the Defendant's view. He asks for a decision in accordance with the ordinary grammatical construction of the will, supported as it is by the case of *Peppin* v. *Bickford*, that an absolute interest did not vest in *Daniel Pearce*.

Mr. *Greene*, Q.C., and Mr. *H. J. M. Williams*, for the Plaintiffs:—

The 3rd rule laid down in *Jarman* on Wills (4) applies to this case. It is, that if there be a devise to the wife of *A.*, and "if there be no such person either at the date of the will or at the death of the testator, it applies to the woman who shall first answer the description of wife at any subsequent period." If there were any doubt, which there is not, as to *Lucy Pearce's* title, a demurrer is not the proper mode of trying it. The will speaks of one husband of each daughter, for the words must be read *reddendo singulo singulis*. "Unmarried" means, in this will, never having been married: *In re Sander's Trusts* (5). The testator does not speak of his daughters being widows, but of the share of the husbands. What husbands? If successive husbands can take—and there is nothing to denote that they were to do so—the vesting of the property would be postponed. But it is submitted that the first husbands were entitled absolutely. The decision in *Franks* v. *Brooker* is in the Plaintiffs' favour, but it need not be relied upon, for the rule in Mr. *Jarman's* book and the decision in *Driver* v. *Franks* (6), where it was said that the object of both Courts of Law and Equity is to vest interests as soon as the words of the instruments will admit of it, clearly support the Plaintiffs' view. In

(1) 3 Ves. 570.
(2) 27 Beav. 635.
(3) 6 Jur. (N.S.) 87, 88.
(4) 3rd Ed. vol. i. p. 304.
(5) Law Rep. 1 Eq. 675.
(6) 3 M. & S. 25; 8 Taunt. 468.

Boreham v. *Bignall* (1) the gift of an annuity was held not to extend to the widow, who was the second wife of a nephew. *Carlton* v. *Thompson* (2) is valuable, as shewing the period of vesting. The demurrer ought to be overruled, and the question left to be decided at the hearing.

[They also cited *Malcolm* v. *Malcolm* (3) and *In re Lyne's Trusts* (4).]

Mr. *Dickinson*, in reply:—

The rule referred to in Mr. *Jarman's* book does not affect this case, because it is applicable to a direct gift to a person who is to be the first taker. I dissent from the views expressed by Mr. *Jarman*, for which no authority is referred to, but which seems to favour the Plaintiffs' contention. *Driver* v. *Franks* (5) is not an authority in this case. *Malcolm* v. *Malcolm* was not decided upon the question now before the Court; and the decision in *In re Lyne's Trusts* is in favour of the Defendant's contention. *Carlton* v. *Thompson* does not amount to more than a statement of the law that it favours vesting at the earliest period. *In re Sander's Trusts* (6) shews that "unmarried" does not mean "not married," but "not married at the time;" and if a woman be a widow at the time she is unmarried, the intention of the testator is manifest from the words which he has used, and it has not been destroyed by the authorities referred to. No good title can be made to the estate.

Sir John Wickens, V.C.:—

This is a demurrer to a bill for specific performance filed by vendors against a purchaser. *Lucy Pearce*, who is a widow, and one of the Plaintiffs, claims a moiety of the estate in fee simple under a devise from her late husband. The Defendant questions her title, and says that it is bad, or too doubtful to be forced on him. The title accrues under the will of *Thomas Draper*, *Lucy Pearce's* father, who, in January, 1831, having then two daughters, both unmarried, gave his real and personal estate to trustees:—

(1) 8 Hare, 131.
(2) Law Rep. 1 H. L., Sc. 232.
(3) 21 Beav. 225.
(4) Law Rep. 8 Eq. 65.
(5) 3 M. & S. 25; 8 Taunt. 468.
(6) Law Rep. 1 Eq. 675.

V.-C. W. 1871

RADFORD v. WILLIS.

[His Honour read the words of the gift.] *Lucy*, after her father's death, married *Daniel Pearce*, who died in 1868, having given her by will all his interest in the estate in question. The effect of a devise to *A.* (an unmarried man) for life, with remainder to his wife in fee, is, I believe, unsettled by authority. Mr. *Jarman* thought (1) that such a devise would give an absolute interest to the first person who acquired the title of *A.'s* wife; but he cites no authority for this except *Driver* v. *Frank* (2). Moreover, *Peppin* v. *Bickford* (3), to which he refers for some special circumstance, is in some degree inconsistent with his view.

The passage in the note in *Powell* on Devises (4) seems to have been preserved in all the editions of *Jarman* on Wills, up to and including the last, without any addition of authority. *Driver* v. *Frank* does not seem to warrant the general proposition deduced from it. That case, I think, must be taken to have proceeded on the simple principle that the second son of *A.* on the body of *B.* begotten, means the second son born of *A.* and *B.*, as held in *Trafford* v. *Ashton* (5), and no other person. It is unnecessary for the present purpose to determine whether it is or is not true as a general proposition, that a gift to *A.* for life, with remainder to a person who may afterwards bear a given relation to *A.*, the relation being one which may be borne by numerous persons successively, is by virtue of the rule of law which favours the earliest possible vesting, a gift to *A.* and to the first person who shall bear that relation. For the gift in question here is a gift to trustees in trust for an unmarried daughter of the testator for her separate use, and after her death in trust to convey to her husband to hold to him and his heirs. Unquestionably, if the direction to convey had been to a person named, or to a person like a firstborn son, who would be ascertained at once, and finally, as soon as a son was born, the executory form would not have prevented the vesting of the remainder. But, in this case, the testator directed a conveyance to be made at a future time to a person answering a description which may at or before that time have perfectly attached to numerous persons, directing it in terms which shewed that he was

(1) *Powell* on Devises, 3rd Ed. vol. i. p. 340, n.
(2) 3 M. & S. 25; 8 Taunt. 468.
(3) 3 Ves. 570.
(4) Vol. i. p. 340.
(5) 2 Vern. 660.

V.-C. W. 1871 RADFORD v. WILLIS.

contemplating a person then living. I think it not unreasonable to hold that, as between the several persons who might equally answer the character of his daughter's husband, the testator meant the trustees to convey to the living one, if there should be a living one.

No doubt the word "unmarried" in the alternative gift over is hardly consistent with this view if it is to have its primary sense of not having been married. But the secondary sense of discovert is almost as natural; and I think that the slight preference of the former over the latter, which appears to be established by authority, is not enough to decide the scale.

Therefore, deciding nothing as to the general proposition, and giving no opinion on the effect of this will if *Lucy Pearce* should die without leaving a husband surviving her, I simply hold that, if she should leave a husband surviving her, his claim to the estate will be a good one. It is not necessary, perhaps, to go as far as that, for if the supposed claim is not clearly a bad one, I ought in this case, which is one of specific performance, to allow the demurrer. In any case, I consider the title not such as can be forced on a purchaser, and allow the demurrer.

Solicitors: Mr. *W. H. Bishop;* Mr. *W. Wyatt.*

V.-C. W. 1871 June 2.

In re MASON'S TRUSTS. *Ex parte* SMITHETT.

Practice—Petition by Tenant for Life for Payment of Dividends—Trustee's Costs.

Costs of trustee, who was served with and appeared upon a Petition by tenant for life for payment of dividends, ordered to be paid out of income.

7 Ch. 609.

PETITION for payment to the Petitioner of a small sum of cash representing dividends; and to him and his assigns during his life, or until further order, of the dividends accruing upon a sum of £3000 New 3¼ per Cent. Annuities, and a sum of £246 4*s.* 10*d.* £3 per Cent. Consolidated Bank Annuities, as and when the same should become due.

V.-C. W. 1871 *In re* MASON'S TRUSTS. *Ex parte* SMITHETT.

Mr. *A. E. Miller,* for the Petitioner.

Mr. *Kekewich,* for the Respondent, the surviving trustee, asked that his costs should be ordered to be paid either out of the *corpus* or out of the cash which had accrued from dividends. He referred to the cases of *In re Marner's Trusts* (1), where the costs were ordered to be paid out of the income; *In re Gordon's Trusts* (2), where the costs were ordered to be paid out of the *corpus; In re Whitton's Trusts* (3), where the costs were ordered to be paid out of the income; *In re Smith's Trusts* (4), where the costs were ordered to be paid out of the income; and *In re Wood's Trusts* (5), where the costs were ordered to be paid out of the *corpus.*

SIR JOHN WICKENS, V.C.:—

I shall follow the cases decided by Vice-Chancellor *Kindersley,* Vice-Chancellor *James,* and the Master of the Rolls, and order these costs to be paid out of the dividends.

Solicitors: Messrs. *Duncan & Murton;* Mr. *G. E. Philbrick.*

V.-C. W. 1871 *June* 2, 9.

In re HOME ASSURANCE ASSOCIATION. (No. 2.)

Practice—Petition for Winding-up—Security for Costs—Amount of Security—Filing Affidavits—Waiver.

A Petitioner—un unsatisfied judgment creditor—residing out of the jurisdiction, asking for an order for the compulsory winding-up of an Association, was, on the application of the Respondents, ordered to give security for costs to the amount of £100:—

Held, that filing affidavits after taking out a summons for security was not a waiver.

THIS was a Petition of *James Orr,* residing at *Glasgow,* an unsatisfied judgment creditor, praying for an order that the *Home Assurance Association, Limited,* might be wound up compulsorily.

(1) Law Rep. 3 Eq. 432. (3) Law Rep. 8 Eq. 352.
(2) Ibid. 6 Eq. 335. (4) Ibid. 9 Eq. 374.
(5) Law Rep. 11 Eq. 155.

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for the Petitioner.

Upon the Petition being called on,

Mr. *Graham Hastings*, for the Association :—

I am instructed to ask that the Petitioner may be ordered to give security for costs. A summons was taken out yesterday for this purpose; but it is not returnable till Monday, the 5th. Affidavits have been filed this morning on behalf of the association, but by taking that step in the proceedings the right to require security has not been waived. *Ex parte Seidler* (1) is a precise authority, and *Atkins* v. *Cooke* (2) supports it. The amount of the security is settled by Cons. Ord. XL., Rule 6. It is there ordered that £100 shall be the penal sum in which the bond shall be given as the security to cover costs by a Plaintiff who is out of the jurisdiction of the Court.

Mr. *Dickinson* :—The Petition was answered on the 22nd of May; and affidavits having been filed on the part of the association only this morning, I submit, upon the authority of the case before Vice-Chancellor *Kindersley*, that, having regard to the circumstances of the case, no security ought to be required; but if the Court should be against the Petitioner on that point, then I submit that, upon the authority of *Atkins* v. *Cooke* (3), *Partington* v. *Reynolds* (4), and *Daniell's* Chancery Practice (5), the amount of security ought to be no more than £40. In *Ex parte Seidler* nothing was done beyond ordering the application to stand over.

SIR JOHN WICKENS, V.C. :—

I do not think that by filing the affidavits on the part of the association the right to security for costs has been waived. The case of *Ex parte Seidler* is not to be found in the Registrars' books; and it is said that the case is questionable as an authority. The Master of the Rolls had, however, occasion to consider this question in the case of *Murrow* v. *Wilson* (6), where the Plaintiff

(1) 12 Sim. 106.
(2) 3 Drew. 694.
(3) 3 Jur. (N.S.) 283.
(4) 6 W. R. 307.
(5) 5th Ed. vol. i. p. 33, n.
(6) 12 Beav. 497.

V.-C. W. 1871 *In re* HOME ASSURANCE ASSOCIATION. (No. 2.)

described himself as living abroad. He having given notice of a motion, the Defendant appeared and asked for time to answer the affidavits, and he afterwards filed some in opposition. The Master of the Rolls reserved his judgment, and came to the conclusion that the Defendant had not waived his right to security for costs. It is important, however, that the practice on such a question as this before me should not be unsettled. In this case the Respondents had, before filing affidavits, taken out a summons for security for costs, and the affidavits were filed, as it were, under protest. I hold that the Respondents are entitled to security. Then as to the amount. I think it should be £100. In *In re Royal Bank of Australia* (1), before Vice-Chancellor *Knight Bruce*, upon a Petition by a shareholder describing himself as of *Edinburgh*, for the usual order to wind up that company, the Petitioner was ordered to give security for £100. I therefore, upon that authority, fix that amount.

June 9. Security having been given by the Petitioner, the Petition came on again to be heard.

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for the Petitioner, stated the facts of the case, and asked for the usual compulsory winding-up order.

Mr. *Karslake*, Q.C., and Mr. *Ince*, for other creditors, supported the application.

Mr. *Graham Hastings* did not dispute the debt, but said that the association had made a call upon the shareholders, and would shortly be in a position to satisfy these creditors; and asked that the drawing up of the order might be postponed for a fortnight.

SIR JOHN WICKENS, V.C.:—

The Petitioner is entitled to the order which he prays for; and I cannot give any special directions.

Solicitors: Messrs. *Roberts & Simpson*; Messrs. *Howard & Co.*; Messrs. *G. & A. Lindo.*

(1) 3 De G. & Sm. 186.

In re KEANE.
LUMLEY *v.* DESBOROUGH.

V.-C. W.
1871
June 9.

Petition by Solicitor—23 & 24 Vict. c. 127—Costs charged on Fund preserved—Married Woman—Separate Estate without Power of Anticipation.

Costs of a married woman, incurred by her in the defence to a suit by her husband to set aside a post-nuptial settlement whereby funds were assigned to trustees to secure an annuity to her separate use, without power of anticipation, charged under the provisions of sect. 28 of 23 & 24 Vict. c. 127, on the annuity.

BY an indenture of settlement, dated the 11th of March, 1864, between Major *Lumley* of the first part, and *Eliza* his wife of the second part, and *L. Desborough* and *J. Brown* of the third part, after reciting that no settlement had been made on the marriage of the said Major *Lumley* and his wife, and that in consideration of natural love and affection he had for many years past had it in contemplation, and had at the date of the settlement now in recital determined to settle upon her an annuity or yearly sum of £300 during her life, to commence from the 1st of March, 1864, to be secured by the covenants, transfers, powers, and provisions therein respectively contained, and reciting that the said Major *Lumley* was possessed of certain mineral and other property, it was witnessed that, in consideration of the premises and in pursuance of the said agreement in that behalf, Major *Lumley* covenanted with the said trustees that he would, during the life of the said *Eliza Lumley*, pay to the trustees such an annual sum of money as, deducting income-tax, should leave the clear annual sum of £300 sterling, by equal monthly payments in advance; and it was by the said indenture declared that the trustees should pay such annuity by such monthly instalments to the said *Eliza Lumley* for her sole and separate use, independently of her said husband and of her debts, and that her receipt alone should be a discharge for the same, and that she should not have power to deprive herself of the benefit thereof by anticipation. Major *Lumley* then, by the deed, assigned certain mineral and other property in order to secure the said payments; and it was by the deed further provided, that

V.-C. W. 1871 *In re* KEANE. LUMLEY *v.* DESBOROUGH.

in case Major *Lumley* should neglect or omit to place sufficient moneys in the hands of the trustees, to meet any deficiency that might arise in the funds, it should be lawful for the trustees to meet such deficiency by a sale of the principal. The deed also contained a proviso for the payment of the trustees' costs, and also, on the death of Mrs. *Lumley*, for the re-assignment of the property to Major *Lumley*.

On the 25th of February, 1868, Major *Lumley* filed a bill in the Court of Chancery to set aside the said settlement, on the ground that at the date of his marriage *Eliza Lumley* had a husband living. He also caused a notice to be served on the trustees not to continue to pay the annuity. The bill was originally filed against the trustees and Mrs. *Lumley*. Major *Lumley* also, in November, 1868, caused the said *Eliza Lumley* to be indicted for bigamy. Mr. *Keane*, Mrs. *Lumley's* solicitor, the present Petitioner, was made a Defendant by amendment, in respect of certain furniture, part of the trust property, which had been sold, and the proceeds received by Mrs. *Lumley*. Mr. *Keane* was employed by Mrs. *Lumley* to defend the suit, which was, on the 2nd of June, 1870, dismissed with costs, to be paid by the Plaintiff. The costs of Mrs. *Lumley*, including therein the costs incurred by Mr. *Keane* in the defence of the suit from the time of his being made a Defendant, had been taxed at the sum of £499 6*s.* 7*d.*, including therein the sum of £1 2*s.* 6*d.* for the costs of a writ of subpœna (which was issued and personally served on the Plaintiff in August, 1870) for the recovery thereof.

In consequence of the notice given by Major *Lumley*, the trustees did not pay Mrs. *Lumley* the annuity pending the suit, and the result was that about £700 had accumulated, of which, by an arrangement between Mrs. *Lumley* and Mr. *Keane*, £500 was paid to Mr. *Keane* and £200 to Mrs. *Lumley*. Of this sum of £500, Mr. *Keane* applied £271 11*s.* 10*d.* in part payment of the costs of the suit.

Mr. *Keane*, on the 7th of January, 1871, presented a Petition, shewing that no part of the sum of £499 6*s.* 7*d.* had been paid by the Plaintiff, who, since the subpœna was served upon him, had disappeared and could not be found, and, as the Petitioner believed, had gone abroad, or was otherwise keeping out of the way to

avoid the process of the Court. The Plaintiff had, as was also believed, no income or property except his interest in the property comprised and subject to the trusts of the settlement, subject to numerous incumbrances of considerable amount effected by him thereon; and praying that it might be declared that he was entitled, in respect of the preservation through his instrumentality as the solicitor of Mrs. *Lumley* in the defence of the suit of the annuity provided and secured to be paid to Mrs. *Lumley* during her life, to a charge upon the annuity and upon all the monthly payments thereof for the balance of his taxed costs, charges, and expenses of or in reference to the suit, after deducting the sum of £271 11*s.* 10*d.*; that the annuity might be sold with the approbation of the Court, and that out of the moneys to arise from such sale the balance certified to be due might be paid, or that the sum might be raised out of the annuity in such other manner as to the Court should appear proper.

Mrs. *Lumley's* affidavit stated that Mr. *Keane* had received £580, and that the sum of £499 6*s.* 6*d.* included Mr. *Keane's* own costs as Defendant in the suit, amounting to £66 2*s.* 2*d.*

The Petition was heard before Vice-Chancellor *Stuart* on the 25th of February, 1871, when the following order was made:—

"This Court being of opinion that the Petitioner is entitled to a charge upon the trust funds (which are by the indenture of settlement, dated the 11th of March, 1864, held upon certain trusts for securing the payment of the annuity of £300 in favour of *Eliza Lumley*) for his costs, charges, and expenses of or in reference to the suit, order that it be referred to the Taxing Master to tax the said costs, charges, and expenses of and in reference to the suit; that the Petitioner do give credit for all sums of money by him received for or on account of the said costs, charges, and expenses, and be at liberty to charge all sums of money paid by him in respect of the costs, charges, and expenses of the suit, and the Taxing Master is to certify the balance remaining due to the Petitioner, after deducting the amount already received by him; that it be referred to the Taxing Master to tax the costs of the Petitioner, and of the trustee and of *Eliza Lumley* of this application, and consequent thereon, as between solicitor and client; that inquiries be made of what particulars the trust funds subject to the trusts for securing the annuity now consist; and that the Petitioner, and the trustee, and *Eliza Lumley* be at liberty to apply at Chambers as to and respecting the payment of the said costs, charges, and expenses, when taxed, out of the said trust funds."

The Petition had been served upon the Defendants, the surviving trustee and Mrs. *Lumley* only. Major *Studdy*, a mortgagee

(1) See 8 W.R. (1871) 52. 7 L.T.S. 194.

V.-C. W. 1871 *In re* KEANE. LUMLEY *v.* DESBOROUGH.

of the Plaintiff's interest subject to the annuity, having had no notice of the Petition, and the order of the 25th of February, 1871, having been made in his absence, leave was, on the 4th of May, 1871, upon motion on his behalf, given to him to present a Petition for the purpose of having the Petition of Mr. *Keane* reheard.

In accordance with the leave so given, Major *Studdy* presented his Petition, stating, in addition to the facts set forth above, that on the 6th of November, 1866, Major *Lumley* executed a mortgage to him, his executors, administrators, and assigns, charging his interest in the property mentioned to be assigned by the indenture of settlement of the 11th of March, 1864, with the repayment of the sum of £1800 (money advanced), subject, nevertheless, to the payment of the annuity, with interest; and stating subsequent further charges; and praying that the Petition of Mr. *Keane* might be reheard, and that the order made on the 25th of February, 1871, might be reversed, or varied in such manner as to the Court might seem meet and the circumstances of the case might require.

The principal sum due to Major *Studdy*, as mortgagee of the interest of the Plaintiff in the property comprised in the settlement, amounted to £3706 5*s.*, with an arrear of interest thereon.

June 9. The Petition now came on to be reheard.

Mr. *Hardy*, Q.C., and Mr. *Langworthy*, for Major *Studdy*:—

The costs of the suit were not made a charge upon the property, but were to be paid by the Plaintiff in the usual manner. In the settlement there is no express provision that the trustees' costs shall be raised and paid, as well as the annuity; but, no doubt, the Court would say, if the trustees incurred costs, that they were entitled to be paid them. The Petition of Mr. *Keane* was founded exclusively upon the 28th section of the statute (23 & 24 Vict. c. 127), which gives the Court power to declare that a solicitor is entitled to a charge upon the property recovered or preserved for costs. The effect of the section is not to give a charge upon the

property in this settlement, but only upon the interest of the client: *Berrie* v. *Howitt* (1). The prayer of the original Petition was for a charge upon the annuity only. Major *Studdy* advanced his money upon the security of the property comprised in the settlement, subject to the annuity only; and if Major *Lumley* had been successful in his suit the annuity would have been removed out of the way, and the mortgagee's security would have been greatly improved in value.

[The VICE-CHANCELLOR:—The Act does not apply to infants?]

No; it does not. That was so decided in *Bonsor* v. *Bradshaw* (2). The terms of the order complained of go beyond the prayer of the Petition. *Twynam* v. *Porter* (3) is the most recent case on the subject, and there it was declared that the Petitioners were entitled to a charge upon the interests of the parties in the hereditaments recovered or preserved; and it is submitted that the order made in February last ought to be so varied as not to extend beyond the annuity. It may be contended that Mrs. *Lumley* is not merely entitled to her annuity, but also to tack her costs to her security; but if it be, the case of *Parker* v. *Watkins* (4) will be an answer to that contention; for there it was held that if a mortgagee has, for the benefit of all parties interested, defended the title, he is entitled to charge his costs; but if his title only be disputed, the costs of his defence should not be borne by the estate as against the parties interested in the equity of redemption. The right to tack costs is not within the provisions of this Act.

Mr. *Dickinson*, Q.C., and Mr. *Cates*, for Mr. *Keane*:—

This case clearly comes within the 28th section, which enacts, that "in every case" in which a solicitor shall be employed to defend any suit in any Court (there is no exception whatever) "it shall be lawful for the Court" (those words must be considered as being imperative, and not discretionary; or, if so, only that amount of discretion which is to be exercised, having regard to the

(1) Law Rep. 9 Eq. 1.
(2) 7 Jur. (N.S.) 231; on app., 10 W. R. 481.
(3) Law Rep. 11 Eq. 181.
(4) Joh. 133.

V.-C. W. 1871

In re KEANE. LUMLEY v. DESBOROUGH.

facts of the case, if they bring it within the words of the statute) to declare such solicitor entitled to a charge upon the property recovered or preserved. Mrs. *Lumley* does not seek to charge, incumber, or anticipate her annuity, but whatever shall be done will be by force of the statute. It is a charge ordered by the Legislature. The Court will sell the property of a married woman settled to her separate use without power of anticipation: *Fleming* v. *Armstrong* (1); and the *Married Women's Property Act*, 1870 (33 & 34 Vict. c. 93), s. 12, extends to property settled to the separate use of a married woman without power of anticipation: *Sanger* v. *Sanger* (2). That case will govern the decision here. *Bailey* v. *Birchall* (3) was a case like this, and there it was held that the solicitor was entitled under the Act to a charge upon the property recovered or preserved for his costs of the litigation, irrespective of his client's interest in the property, and although it turned out that the latter had not any interest therein. It was a charge upon the entire property.

[The VICE-CHANCELLOR:—*Berrie* v. *Howitt* (4) seems to be directly opposed to *Bailey* v. *Birchall* in principle.]

What is said in the judgment in *Berrie* v. *Howitt* the statute does not authorize; it is merely *obiter dicta*. If, however, the two decisions are in opposition, that one is to be preferred which is in accordance with the statute, and that is *Bailey* v. *Birchall*. Major *Studdy's* security was taken long subsequent to the settlement. He took the equitable interest in the property, subject to the liability which the law has imposed upon it for costs in preserving it. If the order of the 25th of February be bad through being made in Major *Studdy's* absence, that defect can be cured now he is present. The same order ought to be made upon this Petition of rehearing; but supposing it should be considered that the order in its present form should not have been made, then Mr. *Keane* asks for the order prayed for in his Petition. There is a great distinction between this case and that of *Bonsor* v. *Bradshaw*; but even there, after the majority of the infant, the Court declared that the costs were a charge on the estate (5).

(1) 34 Beav. 109.
(2) Law Rep. 11 Eq. 470.
(3) 2 H. & M. 371.
(4) Law Rep. 9 Eq. 1.
(5) 4 Giff. 260.

Mr. *Rendall*, for Mrs. *Lumley*:—

I do not object to the order as it stands, but I resist any variation of it making the costs a charge upon the annuity. The statute does not authorize the Court (but even if it does, the Court will not exercise the power) to charge this annuity settled to the separate use without power of anticipation. *Robinson* v. *Wheelwright* (1) established the principle which ought to be followed in this case; and that principle was carried further in *Clive* v. *Carew* (2), where a wife's property so settled was not applicable to make good a loss occasioned by her own breach of trust; in fact, she had committed a fraud. What the Court has to look at is the intention of the author of the settlement: *Jackson* v. *Hobhouse* (3); *Lewin* on Trusts (4). The Legislature did not, in using the word "employed," intend to bind "incapacitated" persons. The words of the 28th section cannot be construed to apply to married women. Mrs. *Lumley* employed Mr. *Keane*, as she was at liberty to do, as her husband's agent, and the husband has been ordered to pay her costs. According to the doctrine at law, a wife cannot employ a solicitor: *Oulds* v. *Sansom* (5); *Graham* v. *Jackson* (6); *Pulling's* Law of Attorneys (7). Major *Lumley* has been neither bankrupt nor insolvent; and though he has made two compositions, yet Mr. *Keane* ought to sue him for his costs. *Heydon's Case* (8) and *Dwarris* on Statutes (9) shew that Acts of Parliament ought to be construed according to the properly ascertained intention of the parties that make them: and the 28th section of this statute applies only to parties who are *sui juris*, for there is no indication of any intention to extend it to incapacitated persons; and, in fact, the latter branch of the section contains an indication to the contrary. There has been no case on the point since the Act was passed but that of *Bonser* v. *Bradshaw* (10), but it has always been understood that it does not apply to parties under incapacity: *Seton* on Decrees (11). *Sanger* v. *Sanger* (12), being under the

(1) 6 D. M. & G. 535.
(2) 1 J. & H. 199.
(3) 2 Mer. 483.
(4) 5th Ed. p. 555.
(5) 3 Taunt. 261.
(6) 6 Q. B. 811.
(7) 3rd Ed. p. 89.
(8) 3 Rep. 7 a.
(9) 2nd Ed. p. 551.
(10) 7 Jur. (N.S.) 231; on app., 10 W. R. 481.
(11) 2nd Ed. p. 839.
(12) Law Rep. 11 Eq. 470.

V.-C. W. 1871 — *In re* KEANE. LUMLEY *v.* DESBOROUGH.

Married Women's Property Act, can have no bearing upon this one. The intention of the maker of every settlement is to provide a fund which cannot be taken away; and the Court has not, because Major *Lumley* filed a bill against his wife, and was unsuccessful, any authority for making an order which will take away that fund.

Mr. *Greene,* Q.C., for the surviving trustee of the settlement, asked that his costs should be provided for.

SIR JOHN WICKENS, V.C.:—

8 Ch. D. 488

It seems to me that the prayer of the original Petition was quite right, although there was some ambiguity in its seeming to pray for Mr. *Keane's* own personal costs in the suit as well as the costs of Mrs. *Lumley,* but that ambiguity has since been corrected. I have not had the advantage of seeing any note of what was said by Vice-Chancellor *Stuart,* except a short one in the *Weekly Notes,* and consequently I am placed in some difficulty, as it is not easy in all respects to reconcile the opinion which I have formed with that which appears by the order to have been formed by Vice-Chancellor *Stuart.*

I am, however, bound to express my own opinion, and it is this, that Mr. *Keane* is entitled to a charge upon the annuity, and not upon the trust fund generally; and I am also of opinion that such charge should be for the costs of Mrs. *Lumley* only, and not for Mr. *Keane's* own costs.

That part of the order, therefore, which recognises Mr. *Keane* as having a charge upon all the trust funds, and which would in terms remain, even if Mrs. *Lumley* should die to-morrow, for his own costs, as well as for those of Mrs. *Lumley,* is erroneous. It may be said that Major *Studdy* is not aggrieved, because there was no formal declaration of right, but only the expression of an opinion by the Court that the costs are a charge upon the trust funds, and that the order directs an inquiry as to what the trust funds consist of. I apprehend, however, that when an order which directs a certain proceeding is prefaced by an opinion, the meaning of it is that the inquiry shall be made with reference to that opinion and upon the footing of it, and if the opinion be so erroneous as to prejudice the

rights of Major *Studdy*, the prosecution of the inquiry and the working out of the order would also prejudice them; therefore no one can say that the objection of Major *Studdy* to the order is a mere shadow. The argument that Mrs. *Lumley* had a charge upon the trust funds for her costs, as being in the position of a mortgagee, and that Major *Studdy* took as second mortgagee, subject not only to the first mortgage, but, by implication, to those costs, seems to be inconsistent with the decision in *Parker* v. *Watkins* (1) and with principle.

Then the question is, Have I jurisdiction to make this annuity subject to these costs? The objection urged against my doing so was, that the interest to which Mrs. *Lumley* is entitled is an annuity settled to her separate use, without power of anticipation, and that such an interest is not within the provisions of the Act of Parliament. A case has been cited, *Bonser* v. *Bradshaw* (2), in which it was held that the estate was not liable to the costs, but that was the case of an infant client, and it differs from this on the very point on which it was decided. It is clear that an infant cannot, but that in this Court a married woman can, as to her separate estate, employ a solicitor, and that she can control and direct his proceedings. She can employ him independently of the Act. Now, a solicitor acting for a married woman, and getting for her funds which, when got, are her separate and inalienable estate, has precisely the same lien upon the funds as if she were a *feme sole*. The intention of the 28th section seems to me to extend to other property a lien analogous to that which a solicitor has on a fund in Court recovered in a suit. If this be a true view, *Bonser* v. *Bradshaw* cannot, I think, be supported, unless upon a strict construction of the word "employed" in the 28th section.

I have come to the conclusion that the order made in February last is not correct; that it is so incorrect that Major *Studdy* has good ground for objecting to it, and that he is quite right in coming here to have it altered, so that his rights shall not be prejudiced. Mr. *Keane* is entitled to a declaration of a right to charge his costs upon the annuity, with consequential directions. I ought to notice the argument that Mr. *Keane's* remedy, primarily

(1) Joh. 133. (2) 7 Jur. (N.S.) 231; on app., 10 W. R. 481.

V.-C. W. 1871 *In re* KEANE. LUMLEY *v.* DESBOROUGH.

against the husband, has not been worked out; but I think I must consider that everything that was in the power of Mr. *Keane* to do has been done, and that he comes here on account of a *bonâ fide* difficulty, in suing the husband for the costs to which he is entitled. The order will, after reciting the opinion of the Court, contain a declaration to the effect which I have mentioned. I think it will be sufficient to give liberty to apply at Chambers with reference to the enforcement of the charge. It will not be necessary to direct an inquiry as to the trust funds. As to the costs of this application, I apprehend that, according to the strict rule, I ought to make the same order which should have been made upon the Petition when it was first heard, to give every one his costs excepting the husband; but I feel a difficulty, with reference to this Petition of rehearing, in throwing the costs upon the annuity. I have no difficulty in expressing an opinion that the trustee is entitled to his costs, but I will not make any order. I cannot throw Mr. *Keane's* costs, either on the motion or upon this Petition, as an additional charge upon the annuity, and therefore as to his costs there will be no order. Major *Studdy* will be allowed to add his costs to his security.

Solicitors: Mr. *H. M. Daniel*, agent for Messrs. *Hooper & Michelmore, Newton Abbott;* Mr. *D. Keane;* Messrs. *Desborough & Son;* Messrs. *Elmslie, Forsyth, & Sedgwick.*

V.-C. W. 1871 *June* 9.

In re SHAW'S TRUSTS.

Will—Questions for Opinion of Court—Power of Leasing to Trustees.

The Court, on a special case under the 22 & 23 Vict. c. 35, and the 23 & 24 Vict. c. 38, for its opinion, declined to give power to trustees to grant leases of real estate for a term not exceeding ten years.

Naylor v. *Arnitt* (1) observed upon.

SPECIAL CASE.

F. M. Shaw, who died in April, 1871, by will, in 1869, after giving annuities and legacies, gave the residue of her estate to

(1) 1 Russ. & My. 501.

trustees, and the annual produce thereof, in trust, as to one-third, to pay the income to her nephew *J. L. Hughes* for life, and after his death to his children, and the other two-thirds to pay to two other nephews and their children in the same manner. The will contained no direction for conversion, no charge of debts or legacies, and no power of sale or leasing. The real and personal estate, *inter alia*, consisted of the underlease of a house for an unexpired term of fifty-seven years, subject to certain covenants, bank stock, colonial bonds, railway stock, and debentures in the *Horticultural Society of London*.

This was a special case under the 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, by the trustees, asking for the opinion and advice of the Court. The Respondents were two of the tenants for life, the other being out of the jurisdiction. The questions were: whether the Petitioners ought forthwith to convert the leasehold; whether the investments in railway and other stocks ought to remain as at the death of the testatrix, or whether the trustees were bound forthwith to convert any, and, if so, which of them; and whether the trustees were entitled to lease the real estate for any and what term.

Mr. *Bowring*, for the Petitioners:—

The questions are asked in consequence of the suggestions of a learned conveyancer; but the first seems to come within the terms of, and to be stronger than, the case of *Howe* v. *Earl of Dartmouth* (1).

[He also cited *In re Elmore's Trusts* (2).]

Mr. *Mackeson*, Q.C., for the Respondents, offered no opposition.

The VICE-CHANCELLOR declared that the leasehold house, and also the investments, excepting the bank stock, ought to be converted with all convenient speed.

Mr. *Bowring*:—Then as to the third question. There is no power to lease the real estate, but there is the authority of *Naylor* v. *Arnitt* (3), where the Court allowed a lease to be granted for

(1) 7 Ves. 137.
(2) 6 Jur. (N.S.) 1325.
(3) 1 Russ. & My. 501.

V.-C. W. 1871 *In re* SHAW'S TRUSTS.

ten years, and I ask that these trustees may be allowed to grant leases for a term not exceeding that period.

Mr. *Mackeson*:—The Petitioners are to remain trustees, and to pay the annual income.

SIR JOHN WICKENS, V.C.:—

I do not think that the decision in *Naylor* v. *Arnitt* (1) is considered to be good law. There is no case which distinctly overrules it; but in the case of *Wood* v. *Patteson* (2) Lord *Langdale* said: "As to *Naylor* v. *Arnitt*, I should be afraid to act on it; for if the trustees, unauthorized by the will, have the power of leasing for ten years, I see no reason why they should not have power to lease for sixty." After that expression of opinion, I think that *Naylor* v. *Arnitt* is not a case to be followed; and I must decline to answer this question.

Solicitors: Messrs. *Surr & Gribble.*

V. C. W. 1871 *April* 26, 27; *May* 6.

In re ORIENTAL HOTELS COMPANY.

PERRY *v.* ORIENTAL HOTELS COMPANY.

Winding-up—Mortgagee's Suit—Liquidator and Receiver—Costs of preserving and realising Assets of Company, and of general Liquidation.

3 Ch D. 426
23 Ch D 574

A company, having erected a hotel at *C.*, and another at *G.*, resolved to wind up, and appointed a liquidator. The voluntary winding-up was ordered to be continued under supervision. By agreement with *P.*, to whom the company were indebted for the erection of the hotel at *C.*, debentures to the amount of £25,000 were to be a first charge, and *P.* had an equitable mortgage subject thereto. He, by leave, filed a bill to enforce his claim, and asked for a sale of the property and for a receiver, and one was appointed; but, on appeal, that receiver was removed, and the liquidator was appointed receiver. In May, 1870, an order was, on the application of the liquidator and receiver, made that he should be at liberty to carry on the business of the hotels, and be allowed all proper expenses incurred in reference thereto. In July, 1870, orders were made approving of a contract entered into for a sale of the hotel at *C.* for £40,000; and that, upon its completion, the liqui-

(1) 1 Russ. & My. 501. (2) 10 Beav. 541, 544.

dator should pay *P.* what was due to him, or deposit a sum in a bank to answer his claim.

In September, 1870, *P.*, having been informed that only £30,000 could be obtained, consented to a sale (which was afterwards sanctioned by the Court) at that sum, and the money was paid to the liquidator.

On summonses in reference to this fund:—

Held, that the liquidator's costs, charges, and expenses of the realisation of the property were payable out of the fund in priority to any claim of *P.* or of the debenture-holders; that the liquidator's costs of preservation of the property were, as between *P.* and the company, payable by them, but that the liquidator was entitled to be indemnified out of the fund for such of those costs as might not be paid out of the company's assets; and that the claims of *P.* and of the debenture-holders had priority over the general costs of liquidation.

THE *Oriental Hotels Company, Limited*, was formed under the *Companies Act*, 1862, for erecting hotels in *India* and *China*, and on the route between *England* and the British settlements in those countries. The company entered into contracts for the erection of two hotels—one at *Cairo*, and the other at *Point de Galle*. The Plaintiff, *John Perry*, a contractor, erected and fitted up the hotel at *Cairo* for the company, and they became indebted to him on account thereof in a sum of £9073. The company, in order to enable them to commence carrying on the hotels, arranged with the Plaintiff that he should have a legal charge for this amount on the company's property at *Cairo* and at *Point de Galle*, subject to a mortgage on the hotel at *Point de Galle* for £8000, and to debentures on both hotels to the extent of £25,000. This arrangement was carried out by an agreement dated the 30th of December, 1869 (see *Perry* v. *Oriental Hotels Company* (1)). The company issued debentures bearing £6 per cent. interest, which were a first charge on the hotel at *Cairo;* and other debentures bearing £12 per cent. interest, which were a second charge on the hotel at *Cairo*, and also (subject to an £8000 mortgage on the hotel at *Point de Galle*. As between themselves the £6 per cent. debentures stood before the £12 per cent. debentures. In February, 1870, a resolution was passed for a voluntary winding-up of the company, and a liquidator (Mr. *Arthur Cooper*) was appointed. An order was in the same month made for continuing the winding-up under supervision. In March, 1870, the Plaintiff, as equitable

(1) Law Rep. 5 Ch. 420.

V.-C. W. 1871 *In re* Oriental Hotels Co. Perry *v.* Oriental Hotels Co.

mortgagee (being also a debenture-holder), by leave of the Court, filed his bill to enforce his equitable mortgage, prayed for an account of what was due to him, and, in default of payment, for a sale, and, in the meantime, for a receiver of the income and profits of the property. On motion by the Plaintiff, a receiver was appointed by Vice-Chancellor *Stuart;* but on appeal that order was discharged, and the liquidator was appointed receiver (*Perry* v. *Oriental Hotels Company* (1)).

On the 27th of May, 1870, on the application of *Arthur Cooper,* the liquidator of the company, and the receiver directed to be appointed in the cause, and upon hearing the parties, it was ordered that the said *Arthur Cooper* should be at liberty to carry on the business of the hotels at *Cairo* and *Point de Galle;* and that all necessary and proper expenses incurred with reference thereto should be charged by, and allowed to, the said *Arthur Cooper* in his accounts in the said matter as liquidator, or as receiver in the cause when duly appointed.

Mr. *Arthur Cooper,* as liquidator, had an offer from, and he contracted to sell to, the Viceroy of *Egypt* the hotel at *Cairo* for £40,000, but in that sum the furniture and stores were not included.

On the 22nd of July, 1870, three orders were made: one approving of the contract; another, that, upon the completion of the contract, the liquidator should pay to the Plaintiff the amount of principal and interest due upon his security, with his costs of the suit, or should deposit the sum of £16,000 at a bank in the joint names of the liquidator and the Plaintiff to answer the claim of the Plaintiff as mortgagee and debenture-holder; and the third order, not material to be considered, had reference to commission claimed by, or to be paid to, a Captain *Lynch.*

In September, 1870, the Plaintiff was informed by the liquidator that the hotel at *Cairo* could not be sold to the Viceroy (the only purchaser) for £40,000, but that £30,000 could be obtained for it and the furniture, and the Plaintiff consented to a sale for that sum. On the 7th of October, 1870, a sale was sanctioned by the Court, in a proceeding before the Chief Clerk for the Vacation Judge, to which the Plaintiff was not a party, and it was subse-

(1) Law Rep. 5 Ch. 423.

quently effected for that sum, and the money was paid to the liquidator. The matter now came before the Court on two adjourned summonses: one by the liquidator, dated the 22nd of March, 1870, asking that he might be at liberty to apply £25,000, part of the £30,000, proceeds of the sale, first, in payment of the interest on the debentures secured as a first charge on the hotel at *Cairo* at £6 per cent., and the principal thereof (amounting to £8201 10*s*., or thereabouts); secondly, in payment of the interest on the debentures secured as a second charge on the said hotel, and as a third charge on the hotel at *Point de Galle* at £12 per cent.; and, thirdly, in payment, so far as the balance would extend, of the principal of the said £12 per cent. debentures (amounting to £15,979 10*s*., or thereabouts), and to retain the £5000 balance of the sum of £30,000, and any other sum that might come to his hands in respect of the hotel at *Cairo*, to meet the costs, charges, and expenses of preserving and realising the property, and of and incidental to the liquidation of the company, and any other costs that the said proceeds might be liable to, and that any surplus that might remain, after payment of such costs, charges, and expenses, might be applied in further payment of the debentures: and the other by the Plaintiff, dated the 23rd of March, 1871, asking that the liquidator might be directed to pay into Court, to the credit of the cause, the sum of £30,000 received by him as the purchase-money of the hotel at *Cairo*. The liquidator had, as alleged, applied the income and profits of the hotels, which he had received as receiver, in payment of the general expenses of liquidation.

The questions which arose for consideration were as to the costs of preserving the property, the costs of realising it, and the general costs of liquidation.

Mr. *Dickinson*, Q.C., Mr. *Higgins*, and Mr. *Whitehorne*, for the Plaintiff:—

It is not denied that the debentures are a first charge. They ought to be paid, and the balance secured for the Plaintiff, or the £16,000 ought to be secured in accordance with the second order of the 22nd of July, 1870, which established the Plaintiff's rights, which he has not in any manner waived, and from which

V.-C. W. 1871 *In re* Oriental Hotels Co. Perry *v.* Oriental Hotels Co.

order there has been no appeal, nor any attempt to vary or discharge it. The question is, whether, after payment of ascertained prior charges, the residue of the fund is liable to the costs under the three heads mentioned? The liquidator is in the position of a mortgagor. He, no doubt, fills a double character. As receiver of the rents and profits, he ought to bring in his account in the suit; he having been appointed at the instance of a second mortgagee to realise his own security, and he is not entitled to deduct from the mortgagee's fund the costs which he has incurred in realising the property and the general expenses of liquidation. Mr. *Cooper* having sold in the character of liquidator, any costs that he may be entitled to will be the subject of consideration when the balance is disposed of; but not one shilling of realising the property ought to come out of the Plaintiff's fund: *Morison* v. *Morison* (1); *In re Professional Life Assurance Company* (2). The balance will not be sufficient to pay the Plaintiff his principal, interest, and costs, under the contract in the second order of July, 1870, between him and the first mortgagees and the mortgagor, which order binds everybody concerned in the winding-up and in the mortgagor's estate. Where by consent of a mortgagee property is sold by the Court free from the mortgage security, the costs of other parties ought not to be paid out of the proceeds: *Ward* v. *Mackinlay* (3). This is a direct authority, and upon it the Plaintiff is entitled to the judgment of the Court.

Mr. *Greene*, Q.C., and Mr. *Jackson*, for the liquidator:—

The conduct of the liquidator has been open and fair in every particular. He has had no interest in the matter, except to do his duty as an officer of the Court. The Plaintiff knew that his position as mortgagee was subordinate. He consented to a sale of this hotel for £30,000, and that sum will probably be swallowed up in paying off the debentures, interest, and costs. The order of the 27th of May was made in the presence of all parties, and it was acted upon with the Plaintiff's full knowledge and assent. It gave the liquidator his costs of carrying on the hotels, and he claims to be paid his costs, not only of preserving, but of realising

(1) 7 D. M. & G. 214. (2) Law Rep. 3 Ch. 167.
(3) 2 D. J. & S. 358.

the hotel as a going concern, and of general liquidation, in priority to payment of the debenture-holders and of the Plaintiff: *In re Marine Mansions Company* (1). All these costs must be considered as costs of administration and realisation of the property: *Armstrong* v. *Storer; Bazalgette* v. *Storer* (2); but, as against the debenture-holders, he is entitled to all his costs under the order of the 27th of May, 1870. A mortgagee has defined rights, which he can pursue if he think fit, but here the Plaintiff came in under the winding-up, and he has been made a party to the orders of the Court. The Plaintiff can have no relief as against the debenture-holders. The great object has been to consolidate the suit and the winding-up, to minimise the expenses, and not to interfere with the rights of the Plaintiff. The liquidator has given the Plaintiff the benefit of his receivership; and, under the circumstances, he asks that all his costs may be paid or provided for in priority out of the fund. The liquidator sold the hotel for the benefit of the first mortgagees. That gave him a title to his costs, on the principle that mortgagees are entitled to charge costs of realisation as against those behind them. The fact of the liquidator being receiver did not prejudice his position. He made a title to the purchaser as liquidator. As to the costs of preserving the property, there is an express order; but if there were none, these costs would come within the principle of the decision in *In re Marine Mansions Company;* but if an official of the Court has out of his own pocket found money to keep a concern going he has a right, as against all parties, to be reimbursed. But this is a case under the *Companies Act,* 1862, sect. 151. Section 95, clause 2, authorized the liquidator to carry on the business of the company, and the Court was fully justified in making the order of the 27th of May. The 144th section gives all costs, &c., out of the assets in priority to all other claims, and under the 110th section the Court may, in the event of the assets being insufficient, make an order as to the payment of costs, &c., in such order of priority as it may think fit. The Court has therefore full power under the Act to make these costs of preserving and realising the property, and the costs of liquidation payable out of the fund in priority.

(1) Law Rep. 4 Eq. 601. (2) 14 Beav. 535.

V.-C. W.
1871
In re Oriental Hotels Co.
Perry *v.* Oriental Hotels Co.

Mr. *Dickinson*, in reply:—

The accounts are those of a liquidator, who also fills the character of a receiver, but he ought to bring in his accounts as receiver, and he is not entitled to retain in his hands the balance of the fund which will remain after satisfying the debentures; and he certainly ought not to be allowed to deduct from the fund the costs of realising the property, nor the costs of general liquidation, nor the costs of preserving the property, except so far as they may be allowed in the suit; but whatever may be the rights of the liquidator in reference to preserving the property, the balance of the fund ought to be secured in the mode pointed out in the order of July, 1870.

May 6. Sir John Wickens, V.C., after stating the facts of the case, continued:—

The questions before me now on the two summonses concern the application of the money which has been paid to and is in the hands of the liquidator. I apprehend that the second order of the 22nd of July, 1870, constituted a contract between the liquidator on the one hand and the Plaintiff on the other, which contract, having been sanctioned and confirmed by the Court, I must take to have been regularly and properly made, and I do not consider the subsequent assent of the Plaintiff to the reduction of the purchase-money as amounting to a waiver of it: but the point is not material. The Plaintiff has unquestionably an interest in the money, which the contract recognises. He does not himself ask that effect shall be given to it in specie, and in fact it would be hardly possible to do so. The practical question is, what his interest in the £30,000 really is, and how effect can be now given to it.

In the first place, the expenses of the realisation are, I think, payable out of the fund, in priority to any claim of the mortgagee. The case of *In re Marine Mansions Company* (1) seems exactly in point on the general principle. It is true that the very important case of *Ward* v. *Mackinlay* (2) was not cited in that case, but

(1) Law Rep. 4 Eq. 601. (2) 2 D. J. & S. 358.

considering that what was there said by Lord Justice *Turner* was only an opinion, carefully expressed, it is true, by a great and cautious Judge, in reference to an administration suit and not to a winding-up; and that even as regards administration suits, is opposed to a decision of the Master of the Rolls, in the case of *Dighton* v. *Withers* (1), and to two decisions of the present Lord Chancellor, when Vice-Chancellor, in the cases of *Berry* v. *Hebblethwaite* (2) and *Tuckley* v. *Thompson* (3); I cannot consider the fact that it was not cited as shaking the authority of *In re Marine Mansions Company* (4). It should be observed that, even if the general principle had been otherwise, there is here something like a direct employment by the Plaintiff of Mr. *Cooper* to act as his agent in the sale.

I think it equally clear, on the same authorities, that the mortgagees' claim against the proceeds is paramount to the general costs of the winding-up. The case of *Armstrong* v. *Storer* (5), which was relied on in argument, was the case of a mortgagee instituting an administration suit, and this circumstance, as appears by comparing it with the case of *Dighton* v. *Withers*, is the ground of the decision. The case of *In re Professional Life Assurance Company* (6) is not, I think, in any way inconsistent with this as regards the question between the liquidator and the Plaintiff, or even as between the liquidator and the debenture-holders, considering the peculiar nature of the debentures in this case. But, in any case, I am satisfied that Lord Justice *Rolt* did not intend, by what he said, to decide the general question, even as between a liquidator who has realised all the assets and is distributing them, and debenture-holders whose charge is on the assets generally.

There remains another class of costs, described as costs of preservation. These are costs incurred by the liquidator under the order of the 27th of May, 1870, which it is now necessary to consider more particularly. [The Vice-Chancellor read the order set forth above.] The precise terms of that order seem to me very material. I need not say that considerable difficulty, and also

(1) 31 Beav. 423.
(2) 4 K. & J. 80.
(3) 1 J. & H. 126.
(4) Law Rep. 4 Eq. 601.
(5) 14 Beav. 535.
(6) Law Rep. 3 Ch. 167.

V.-C. W. 1871 *In re* Oriental Hotels Co. Perry *v.* Oriental Hotels Co.

expenses, have arisen in the events which have happened from the circumstance of Mr. *Cooper* filling both characters; although, in the first instance, when the company was reputed to be solvent, nothing could be more natural, and if I may respectfully say so, proper, than the order made by Lord Justice *Giffard*. I need hardly say that a receiver would have had no right to apply for such an order, a receiver not being in a position to initiate any proceedings. Hence the order must be taken to have been made on the application of the liquidator, though Mr. *Cooper* is described in it as filling both offices. It is, in fact, an application by Mr. *Cooper*, as liquidator, for liberty to carry on the business of the hotels which were then in the Plaintiff's possession, by his receiver, the same Mr. *Cooper*. The Plaintiff's assent was therefore necessary, and was given to the order, but this assent would not of itself have involved any liability to the expenses of carrying it on, except as after mentioned. The difficulty arises from the concluding words of the order. On the whole, I think that they do not disturb the rights of the company and the Plaintiff as between themselves; but they give Mr. *Cooper* a right to be paid the costs of preservation as receiver; that is, out of the rents, or upon the principle of the case of *Morison* v. *Morison* (1), which was mentioned during the argument, out of the purchase-money, but only if he does not get them out of the company's assets; and as between the company and the Plaintiff, the costs of preservation come after the mortgage.

In sum, I think the liquidator entitled to be paid out of the £30,000 the costs of realisation (some of which, I should observe, are the subject of dispute) and the costs of preservation, if there are not assets of the company sufficient to satisfy them after paying the debentures and the Plaintiff's mortgage, but not the general costs of the winding-up. I am willing, if it can be done consistently with the practice, to put the order by way of declaration or otherwise in such a form as to enable any one who wishes to have it reconsidered, to have that done at once, and not wait for its being acted upon. These being the rights of the parties, as I understand them, it is desirable to arrange the figures so as to give effect to them without unnecessary inconvenience to any one. I

(1) 7 D. M. & G. 214.

cannot, without more information, say how this is to be done. As to any interest now due, and any principal money now payable on the debentures, which it is reasonably certain will be paid in full, I can sanction immediate payment. To this extent I can give effect to the summons of the liquidator, but subject to this: I do not see how I can do otherwise than impound the balance of the £30,000, which I assume can be most conveniently done by carrying it to a separate account in the winding-up after making the payments out of it which I have mentioned, and directing that it shall not be dealt with without notice to the Plaintiff. I can also direct that the costs of the realisation be taxed and paid, and that any debenture-holders entitled to immediate payment of principal or interest may apply at Chambers for payment out of the fund. The liquidator and the Plaintiff may also have leave to apply as to the former; but I suppose no special leave is necessary. With regard to the costs of these two applications, I think that the costs of both parties, upon the liquidator's application, should be paid by the liquidator out of the assets of the company; and with regard to the other application, which is, as I understand it, that the £30,000 should be paid into Court in the suit, I think that I should best do justice by refusing that without costs, except that the liquidator must have his costs of it out of the assets.

The order will therefore be: Declare that the liquidator's costs, charges, and expenses of the realisation of the property are payable out of the £30,000—I call it that for shortness—in priority to any claim either of the Plaintiff or of the debenture-holders. Declare that the claims of the Plaintiff as mortgagee and of the debenture-holders have priority over the general costs of the liquidation; declare that as between the Plaintiff and the company the costs of preservation are payable by the company, but that the liquidator is entitled to be indemnified out of the £30,000 against any costs of preservation which he may not be paid out of the company's assets. Order the liquidator to pay the principal and interest on the 6 per cent. debentures, and the interest on the 12 per cent debentures other than on those of which the validity is disputed, and let him be at liberty to pay any part of the principal of the 12 per cent. debentures; tax the costs, charges, and expenses of the realisation; let the liquidator, on or before the

V.-C. W. 1871

In re Oriental Hotels Co.

Perry *v.* Oriental Hotels Co.

22nd of June, pay into Court to an account in the winding-up, to be intituled "The *Cairo* Hotel Fund," so much of the £30,000 as may remain after making the payments hereinbefore directed or authorized, and retaining, if then ascertained, his costs, charges, and expenses directed to be taxed. The fund so paid in must not be dealt with without notice to the Plaintiff. Liberty will be reserved to any unpaid debenture-holder or to any other person, (for instance, a person in the position of Captain *Lynch*) to apply for payment out of the fund in Court. The rest of the order will be simply that all parties are to have their costs upon the liquidator's summons out of the general assets, and there will be no order upon the Plaintiff's summons, except that the liquidator must have his costs of it out of the general assets.

Solicitors: Messrs. *Lewis, Munns, & Longden;* Messrs. *Uptons, Johnson, Upton, & Budd.*

Ex parte HUGHES.
In re BROWNE.

C. J. B.
1871
April 17.

Bankruptcy Act, 1869, ss. 12, 13, 15—*Sequestration under an Order of the Court of Chancery—Injunction—Jurisdiction.*

A sequestration in a Chancery suit is a "legal process" within the meaning of the 13th section of the *Bankruptcy Act*, 1869. Where the usual order directing a sale by the sequestrators had been made by the Court of Chancery, and the owner of the property was adjudicated bankrupt before the sale:—

Held, that the Court of Bankruptcy had jurisdiction to restrain the sale.

THIS was an appeal from an order of the County Court of *Denbighshire*, held at *Wrexham*, restraining the sale of property of the bankrupt, which had been seized under a writ of sequestration issued by the Court of Chancery.

Browne was appointed trustee of the will of *John O'Toole*, and accepted the trust, and managed the estate for several years after the death of the testator, which took place in the year 1853. In the year 1866 two of the children of the testator filed a bill against *Browne* for the administration of the estate, and from the accounts taken in this suit it was found that a considerable sum was due from him. By an order of the 2nd of December, 1870, *Browne* was directed to pay £1317 3*s*. 3*d*. into the bank to the credit of the cause; and this payment not having been made, a writ of sequestration upon all his real and personal estate was issued on the 25th of January, 1871. On the 7th of February, 1871, the Master of the Rolls made the usual order, directing a sale of the property seized under the sequestration. On the 10th of February, a petition in bankruptcy, founded on a declaration of insolvency, was presented against *Browne* in the County Court of *Denbighshire*, and on the same day he was adjudicated bankrupt. On the following day the County Court made an interim order restraining the intended sale by the sequestrators; and on the 18th of February the injunction was made perpetual.

Appeal against this order.

C. J. B.
1871
Ex parte HUGHES.
In re BROWNE.

Mr. *Morgan*, Q.C., and Mr. *Bagley*, for the sequestrators:—

The Court below had no power to grant the injunction, and has confused a sequestration under an order of the Court of Chancery with an ordinary execution. A sequestration is different from any other legal process, and is in the nature of a distress, which your Lordship has decided not to be "an execution or legal process" within the meaning of sect. 13 of the *Bankruptcy Act*, 1869. The 12th section of the *Bankruptcy Act*, 1869, which provides that no creditor of the bankrupt shall have any remedy against the property or person of the bankrupt, "except in manner directed by the Act," must be read with the 15th section, by the 3rd sub-section of which the bankrupt's property divisible among his creditors is described to be "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance." A sequestration operates from its date as a charge upon the property comprised in it, which is at once divested out of the debtor and vested in *custodiâ legis*: *Burdett* v. *Rockley* (1); *Tatham* v. *Parker* (2); and therefore is not property within the description in sect. 15, sub-sect. 3. And for the same reason the property did not vest in the trustee in bankruptcy; and therefore the Court below had no power to grant the injunction. The word "sequestration" does not occur in the 95th section, or elsewhere in the *Bankruptcy Act*; and if this order is upheld a sequestrator is in a worse position than an execution creditor.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the trustee in bankruptcy:—

A sequestration is an equitable execution, and nothing more. In an execution the property seized is not charged until it is sold by the sheriff, and it is the same in a sequestration: *Holmes* v. *Tutton* (3). A sequestration is clearly a process, and though not technically a "legal" process, still the words "legal process" in the 13th section clearly include an equitable process, and it could not have been intended that there should be one course of proceeding

(1) 1 Vern. 58.
(2) 1 Sm. & Giff. 506.
(3) 5 E. & B. 65.

for a Court of Law and another for a Court of Equity, and that an injunction may be granted against an ordinary common law execution, but not against a sequestration. *Tatham* v. *Parker* (1) was a case decided under the *Insolvent Debtors Act*, and does not apply.

Mr. *Morgan*, in reply.

SIR JAMES BACON, C.J.:—

The remedy which the Court of Chancery has for obtaining payment of a debt under a sequestration cannot be said to differ substantially from the remedy of a creditor under an execution. It cannot make any difference in the Court of Bankruptcy that one man has pursued his remedy at law, another in equity. The property is not divested by a sequestration. The sequestrators do not turn the debtor out of possession, but lay hands on his goods and chattels, and sell them. The property no doubt is in *custodiâ legis*, but it cannot be said that it is entirely divested out of the debtor, for it is capable of redemption, and upon payment of the debt will be restored to him. I am clearly of opinion that this property was property belonging to the bankrupt within the meaning of the 15th section, and that a sequestration is a "process" within the 13th section. The fact that there is no express mention of the word "sequestration" in the Act is, I think, an argument against, and not in favour of, the Appellants. To overrule the order appealed against would be to frustrate the plain purpose of the Act.

Appeal dismissed without costs.

Solicitors for the Appellants: Messrs. *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Respondent: Messrs. *Helder & Kirkbank*, agents for Mr. *J. D. Pugh, Wrexham.*

(1) 1 Sm. & Giff. 506. 17 Jur. 929

M. R.

1871

May 29, 30; *June* 5.

UPMANN *v.* ELKAN.

Trade-mark—Injunction—Consignee of Goods bearing spurious Mark—Parties—Costs—Lien on Goods.

A person having in his hands or under his control goods bearing a forged trade-mark, is bound, upon the fact being brought to his knowledge, at once to submit to do whatever he might be compelled to do upon bill filed; otherwise, however innocently the goods may have come to him, he will be liable for the costs of a suit instituted by the person whose right is infringed for the purpose of obtaining relief.

The duties of a person who discovers that he has in ignorance infringed a trade-mark considered.

A firm of forwarding agents, carrying on business in *London*, received from correspondents abroad a case of cigars bearing a forged brand. Upon the forgery being brought to their notice, they expressed their willingness to give, and afterwards gave, full information as to the manner in which the cigars came into their custody; and upon a suit being instituted against them, submitted to act as the Court should direct; but they wished to return the cigars to their correspondents, and to some extent defended the suit on their behalf:—

Held, that they were not entitled to their costs; but as they were willing to undertake to give notice to the Plaintiffs' agents if any boxes bearing the Plaintiffs' brand were afterwards consigned to them, they were not ordered to pay costs.

The Plaintiffs, in a suit to restrain infringement of their trade-mark,

Held entitled to have a spurious imitation of their mark removed from goods, and to a lien on the goods for costs, provided that the owners of the goods, who were not before the Court, should not see fit to intervene.

THE Plaintiffs, who were cigar manufacturers in *Cuba*, discovered in June, 1869, that a case of cigars, which were not of their manufacture, but were packed in boxes bearing an imitation of their brand, had arrived at *St. Katharine's Dock*, and was there entered in the names of the Defendants, Messrs. *Elkan*. The Plaintiffs, on the 1st of July, 1869, filed the bill in this suit against Messrs. *Elkan* and the dock company, praying for an injunction to restrain Messrs. *Elkan* from removing the boxes of cigars marked with their brand, and from infringing their mark, and for an account and damages. An *ex parte* injunction was obtained on the 2nd of July; a motion for an interim injunction was made on the 8th, but stood over to the 15th, upon an under-

taking by Messrs. *Elkan;* and on the 15th of July the injunction was granted, Messrs. *Elkan* expressing their willingness to act as the Court should direct, but preferring to have an order issued against them to continuing their undertaking.

Messrs. *Elkan* afterwards put in their answer, and thereby stated that they carried on the business of Continental forwarding agents in *Great Tower Street*, in the city of *London*, and that such business consisted in receiving, forwarding, and delivering goods intrusted to their care by the owners thereof; that they themselves resided in *Hamburg*, and their business in *London* was managed by *Frederick Ronnefeldt* and *Julius Lesser;* that on the 14th of June, 1869, such managers received from Messrs. *Herold & Saenger*, of *Hamburg*, a letter advising a shipment to them as such managers of a case of cigars containing boxes of cigars bearing various brands, and requesting them to pay the duty thereon, and to forward the contents to various persons resident in *England*, whose names and addresses were given in the letter; that the case duly arrived, and was warehoused with the *St. Katharine's Dock Company;* that on the 19th of June the Plaintiffs' solicitor made inquiries respecting the case, alleging that some of the boxes in the case bore a forged brand; that up to that time the managers did not in fact know, and had no reason to suspect, that the case contained any cigars with a forged brand; and that, upon discovering that the Plaintiffs' allegation had a foundation in fact, they disclosed to them the names of the consignors and of the persons in this country to whom the cigars were about to be delivered. It appeared that this information was offered before bill filed, but was not in fact given until the 8th of July. The Defendants, Messrs. *Elkan*, further stated that this was the first transaction they had had with Messrs. *Herold & Saenger;* that their firm did not sell cigars, but merely acted as forwarding agents; that they were not acquainted with the cigar trade, and had no means of knowing whether the brands thereon were genuine or not; and that by reason of the proceedings in the suit, and the continued storage of the dock company, they had incurred divers costs and expenses. In the last three paragraphs of the answer they stated that they were willing to act, with reference to the matters in question in the suit, as the Court might direct, but submitted whether Messrs. *Herold &*

M. R. 1871 UPMANN v. ELKAN.

Saenger ought not to be made parties thereto; and also that they ought to be indemnified against all costs and expenses incurred by them.

The persons to whom the boxes of cigars were directed to be delivered were made Defendants by amendment. All of these said they had no knowledge of or intention to infringe the Plaintiffs' trade-mark, and disclaimed all interest in the cigars; and, with the exception of two, Messrs. *Hamberg & Haar,* were dismissed from the suit. Messrs. *Hamberg & Haar* were retained until the hearing. Messrs. *Herold & Saenger* were not made parties to the suit.

The cause now came on to be heard. The Plaintiffs attempted to shew that the Defendants Messrs. *Elkan* were privy to a fraudulent infringement by Messrs. *Herold & Saenger* of the Plaintiffs' trade-mark; but, in the opinion of the Court, this was not established by the evidence. It appeared, however, that the defence of the suit had been to some extent conducted by Messrs. *Elkan* under instructions from Messrs. *Herold & Saenger.*

Mr. *Jessel,* Q.C., and Mr. *E. Cutler,* for the Plaintiffs, asked for an injunction. They submitted to pay the costs of the dock company and Messrs. *Hamberg & Haar,* whom they said the Plaintiffs had been misled into making parties by Messrs. *Elkan,* and asked to be allowed to add them to their own, and recover all the costs from Messrs. *Elkan.*

Mr. *Terrell,* for Messrs. *Hamberg & Haar.*

[The MASTER OF THE ROLLS said that there was not the least pretence for making them, or any of the persons to whom the boxes were to be delivered, parties to the suit, and that the costs of so doing must be borne by the Plaintiffs.]

Mr. *Speed,* for the dock company.

Mr. *Roxburgh,* Q.C., and Mr. *Bardswell,* for Messrs. *Elkan* :—

There is no doubt that the Plaintiffs have a right to stop the sale of cigars with forged brands, but we have never sold such cigars, or even had them in our possession. We simply receive

from Messrs. *Herold & Saenger* a letter asking us to pay the duty on certain cigars, and then forward them to persons named by them. No doubt we receive payment for so doing, but our profit does not arise from the sale of the cigars: it would be precisely the same if the boxes contained nothing at all. This was our first transaction with *Herold & Saenger;* we had no knowledge or suspicion that the brands were forged. On our being told that they were, we immediately gave full information respecting the cigars to the Plaintiffs, and we are, and always having been, willing to act in the matter as the Court may direct. We have never claimed the cigars in any way. Under these circumstances we occupy exactly the same position as the dock company, and as we have been made parties to the suit we ought, like the dock company, to have our costs from the Plaintiffs. The Plaintiffs ought to have made *Herold & Saenger* Defendants, and to have obtained the costs of the suit from them. There could have been no more difficulty in making them parties than in making us parties.

But we say further that there was no necessity for making us parties to the suit. In *Ponsardin* v. *Peto* (1) a bill was filed against a dock company only, to restrain an infringement of a trade-mark. It afterwards turned out that a person had innocently advanced money on the goods, and he was allowed to remove the fraudulent mark, and take the goods without providing for the costs of the suit. This shews that the Plaintiffs might have obtained all the relief they are entitled to by proceeding against the dock company alone. The cases of *Moet* v. *Couston* (2) and *Hunt* v. *Maniere* (3) support this view; and *Ainsworth* v. *Walmesley* (4) is an authority for the proposition that we ought not to be called on to pay any costs.

[In answer to a question put by the Master of the Rolls, Mr. *Roxburgh* stated that his clients were willing to undertake to give notice to the Plaintiffs' agent if they received in the future any boxes bearing the Plaintiffs' brand.]

Mr. *Jessel,* in reply:—

The Defendants, Messrs. *Elkan,* were the legal owners of the

(1) 33 Beav. 612.
(2) Ibid. 578. 16 Jan 1865
(3) 34 Beav. 157. 11 Jan 1865
(4) Law Rep. 1 Eq. 518.

M. R. 1871 UPMANN v. ELKAN.

goods; they might have removed them from the docks, and distributed them over the country; consequently we were entitled to have an injunction against them. Then it is laid down in *Moet* v. *Couston* (1) that when the Plaintiff is entitled to an injunction, that right carries with it the costs of the suit. In *Millington* v. *Fox* (2) the Plaintiffs were deprived of their costs, only because they had caused an unnecessary degree of litigation. So in *Edelsten* v. *Edelsten* (3), the Plaintiffs were held to be entitled to their costs, and on principle the right is quite clear.

Suppose, in the first place, the Defendants sold the goods with the forged brand. Then clearly it would be no answer to the Plaintiffs' demand that they did not know of the forgery: *Burgess* v. *Hills* (4). The Defendants make a profit by selling the goods; they do not inquire whether the brands are genuine or not; they choose to run the risk of selling without making inquiry, and they must take the consequences. The Plaintiffs have an agent in *London*, and it would be easy to find out whether the brands are genuine or not.

It is true that in this case the Defendants do not sell the goods, they only distribute them; but that makes no difference.

The MASTER OF THE ROLLS:—I think there is no difference between selling and distributing goods; but I do not assent to the whole of Mr. *Jessel's* argument. I have always held that a party using a forged trade-mark, although innocently, is liable for the costs of setting that right up to the time when he first knew of the forgery; but if after that he stops, and is willing to undertake not to go on any further with the use of the mark, he is not liable for further costs. Here the Defendants say they are mere consignees, and have never done anything at all. That is a new case, and I shall consider it.

June 5. LORD ROMILLY, M.R:—

This is a suit for an injunction to restrain the Defendants Messrs. *Elkan* from removing from the docks certain boxes of cigars with

(1) 33 Beav. 578. 10 Jur. N.S. 1012
(2) 3 My. & Cr. 338.
(3) 1 D. J. & S. 185. 9 Jur. N.S. 4
(4) 26 Beav. 244. 5 Jur. N.S. 25

a spurious imitation of the Plaintiffs' brand or trade-mark. The bill asks for an account of profits made by sale, and also for compensation by way of damage and costs of the suit.

The *St. Katharine's Dock Company* are also made Defendants; but as regards them no charge is made or costs asked. The Defendants Messrs. *Elkan*, to whom or to whose order the cigars were consigned, insist that the bill ought to be dismissed against them with costs, and that they are improperly and unnecessarily made parties to the suit, inasmuch as with regard to the fraud complained of they are wholly innocent and have no concern. I think it necessary, in consequence of the high way in which the counsel on both sides have set their claim, to state what I consider to be the law in such cases, and I will then examine the evidence in the case to ascertain to what, if any, extent the parties are compromised.

I begin by assuming (which facts are proved here) that the correspondent of a *London* house sends goods to a *London* dock company to the order of that *London* house, and that the goods have on them the spurious trade-mark or brand of a person to whom the goods do not belong, and who has not been concerned in sending them thither. The person whose trade-mark is fraudulently imitated ascertains this fact before the goods leave the dock: he applies to the dock company not to allow them to leave the dock with the spurious trade-mark, and he applies to the persons at whose order they stand, and asks them to give him all information respecting them, and to undertake not to sell or distribute the goods until the spurious brand is removed.

I assume, then, in addition, that the person so applied to is innocent and ignorant of the fraud. It is his duty at once to give all the information required, and to undertake that the goods shall not be removed or dealt with until the spurious brand has been removed, and to offer to give all facilities to the person injured for that purpose.

If, after that, the person injured file a bill, though he will be entitled to all that he asks in the shape of relief, as he might have got it all without suit, he will not get from such Defendants the costs of the suit, and he may have to pay them. I do not mean by this to lay down that the Plaintiff—by which I mean the per-

M. R. 1871 UPMANN v. ELKAN.

son whose trade-mark is fraudulently imitated—may not file a bill without making any inquiry at all; for it has never been laid down that a Plaintiff entitled to relief must, before filing a bill, apply to the Defendant and ascertain previously whether he will do without suit all that is required, although such a rule might, and probably would, be a very useful one; and I remember Sir *James Wigram* regretting that no such rule prevailed. But the person at whose order the goods stand, can only then stop the further prosecution of the suit by applying to the Plaintiff and consenting to do voluntarily all that he asks compulsorily. And it must always be borne in mind that in cases of injunction rapidity of action is of the greatest importance. It is, in my opinion, a mistake to say that the person at whose order the goods stand can complain if a suit is instituted against him; it arises from the misfortune of his having a dishonest correspondent.

It does not, in my opinion, make any difference whether the goods are sent to a person who does not deal in the article consigned, and whose duty is simply to distribute the goods to other persons, or whether the goods are sent to him as consignee for his own purposes. In either case they are sent to the dock to be at his disposal, and without his signature the goods cannot be disposed of.

It will not do for him to say, as he does in this case, "I know nothing about the goods sent. I do not know whether they have any, or, if any, what brand on them, or whose it is." It is his duty to know this, and if he receives notice that they bear a fraudulent imitation of another man's brand, he ought to ascertain this as speedily as possible after such notice, and to take the proper and necessary steps to prevent their being disposed of in that state. It may be that without notice, and when he sees the trade-mark, he does not know that it belongs to another; if so, he may deal with them innocently; but as soon as he is informed of the fact, he should act at once, so as not to be in any event, either from wilful or from accidental ignorance, made a party to the fraud committed by another; and when he ascertains the fact he should at once inform his correspondent abroad. If it be argued that this imposes upon him serious inconvenience and a duty which by taking the order for goods he never undertook, this may

be admitted to be true; but it is only what would be the case in the event of the importation of prohibited articles, and it arises from the circumstance that he has not taken sufficient care to ascertain what sort of persons the correspondents are for whom he consents to act as agent. After notice, his duty is to cause his correspondents, the shippers, to be informed of this fact as soon as possible. In fact, in many respects the position of the dock company does not differ from his. For all acts done in ignorance they are excusable, but as soon as they receive notice of the fraud, and either by bill filed or by Plaintiff's indemnity the dock company is protected, they must retain the goods until the question is determined, and if proved, the brand removed. Of course, if the Defendants know nothing of the goods, and have not agreed to take charge of them for any purpose whatever, they have nothing to do with the matter but to disclaim, and the shippers will be liable to the dock company for any charges; but that is not the case here. It is admitted or proved that the case of cigars was duly sent to the order of the Defendants by their correspondents. I also think that the answer of the Defendants is not sufficiently distinct as to the steps they ought to have consented to take to avoid being mixed up with the transaction. The claim of the Defendants, in the last three paragraphs of their answer, is irregular, and cannot be maintained:—[His Lordship read them.] In fact, the Defendants treat the matter as if the consignment had been made to the order of a stranger, and they had never undertaken to act as friendly agents. It is, no doubt, very unfortunate to be mixed up with a shipper who makes use of spurious trade-marks; but the person who is injured by the fraud is not called upon to indemnify the consignees for the losses they have sustained by reason of the misconduct of the shipper.

What claim the consignees may have against Messrs. *Herold & Saenger*, for whom they acted, and under whose instructions (as it appears from the correspondence) they have conducted the defence of the suit, I express no opinion, as Messrs. *Herold & Saenger* are not before the Court; but with respect to the Defendants, Messrs. *Elkan*, I do not look on them as guilty persons; and, having regard to the information they offered to give before the bill was filed, and their undertaking, by answer, to act as the Court shall

M. R. 1871 UPMANN v. ELKAN.

direct, and in the absence of evidence to shew that they participated in any attempt to commit the fraud against the Plaintiffs, I shall not order them to pay any costs; but certainly I shall give them none, and I only dispense with paying costs on the undertaking given by their counsel, that if any fresh cigars should be sent over to their order with the Plaintiffs' brand, they will give immediate notice of the fact to the agents of Plaintiffs in *London*, such undertaking not being conditional "if they know of it," as first suggested, but being absolute and without qualification that they will give the information, as they must be able to ascertain this fact when the goods arrive, and they have now knowledge of what the brand of the Plaintiffs is.

I would certainly, as in other cases, give an immediate lien on the goods themselves for the costs incurred by the Plaintiffs, and possibly also by the Defendants, the Messrs. *Elkan*, but for one circumstance. I have not before me the owners of the goods themselves. The Plaintiffs have not made them parties as they might have done, and that to some extent embarrasses the matter; but this arises from the conduct of the Plaintiffs. I will endeavour to remedy this, and I will allow the Messrs. *Herold & Saenger* to intervene, if they think fit, it appearing from the correspondence between them and the Defendants *Elkan* that they are cognizant of the whole suit. If they do not, I shall direct the brand to be removed from the cigars, order Plaintiffs to pay the costs of the *St. Katharine's Dock Company*, and add them to their own costs, and give them a lien on the cigars now in the dock for the amount.

At the same time, I suggest to the parties the propriety of selling the cigars at once, in order to avoid the further expense of the dock company. I disposed of the rest of the case on the occasion of the hearing. I am of opinion that the Plaintiffs were mistaken in making the other persons Defendants, and that they wisely got rid of them. But I cannot say that they were misled by the Defendants *Elkan*. On the contrary, if they had not given the names, which they did as fully as they could, they would have been liable to blame. In fact the readiness with which the information was given by Messrs. *Elkan* is a principal reason why I do not charge them with costs. If they had volunteered at once, when the bill was filed, to erase the brand, or to submit to a decree such as I

now propose to make, I should have given them their costs of suit subsequent to that period. In truth, acting under direction of *Herold & Saenger*, they desired to send the goods back to *Hamburg*, which was out of the question, and, to some extent, defended the suit.

MINUTES:—Order the Plaintiffs to pay to the Defendants *Hamberg & Haar*, and the *London and St. Katharine's Dock Company*, their costs of this suit, to be taxed if the parties differ.

Order that *Herold & Saenger*, the consignors in the bill mentioned, be at liberty to intervene. And order that if they do not do so the brands of the Plaintiffs be erased from the boxes of cigars in the bill mentioned, and that the Plaintiffs do have a lien on the boxes of cigars bearing the brands of the Plaintiffs for their own costs of suit, and also for the amount of the costs which the Plaintiffs may pay under this order to the Defendants, the *London and St. Katharine's Dock Company*, such costs to be taxed by the Taxing Master.

Solicitors: Messrs. *Lumley & Lumley*; Mr. *S. Scott*; Mr. *Le Riche*.

WILLIAMS *v.* POTT.

Possessory Title—Possession of Agent—Adverse Possession—Wrongful Claimant—Statute of Limitations—3 & 4 Will. 4, c. 27, s. 9.

Possession of an agent is possession of the principal; and the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate.

A person claiming, without any real title, to be entitled to land is a person "wrongfully" claiming within the meaning of 3 & 4 Will. 4, c. 27, s. 9; and that section applies, although the claim may be put forward under a mistake, and without any improper intention to deprive others of their property.

THIS was a summons asking that the infant Plaintiff might be admitted as a creditor of *Harriett Williams*, the testatrix in the cause, for the amount of the rents and profits of certain lands and hereditaments of which the Plaintiff was alleged to be tenant in tail, which rents and profits had been received in error by *Harriett Williams*, and not accounted for to the applicant.

The lands and hereditaments in question consisted of three farms in the county of *Brecon*. In 1814 *Howell Jones Williams*

M. R. 1871 WILLIAMS v. POTT.

became tenant in tail thereof, under a settlement made in 1773. He married the testatrix, *Harriett Williams*, and had issue by her his eldest son, the Rev. *Walter Jones Williams*, and other children. He died on the 4th of June, 1848, without having barred his estate tail, but having made a will by which he devised all his real estate to his wife.

Upon the death of *Howell Jones Williams* his eldest son, *Walter Jones Williams*, entered into receipt of the rents and profits of the estate, and continued in such receipt until the time of his death. He gave receipts for the rents, at first expressly as agent for and on behalf of his mother, but latterly in his own name simply; but he always accounted for the rents to his mother, and never, so far as appeared, applied any part thereof to his own use.

Walter Jones Williams died on the 9th of April, 1866, without having barred his estate tail, and leaving the Plaintiff his heir-at-law.

From April, 1866, until August, 1869, when *Harriett Williams* died, the rents of the estate were received by her agent on her behalf.

Harriett Williams, by her will, purported to devise the lands in question to the Defendants upon certain trusts. The present suit was instituted shortly after the death of *Harriett Williams* for the administration of her estate. The decree was made on the 13th of December, 1869, and contained an inquiry whether any of the lands and hereditaments purported to be devised by her will were comprised in the settlement of 1773.

The object of the summons was to determine whether the Plaintiff was entitled to the estate.

It appeared that two out of the three farms were let to tenants from year to year; but the third was held under a lease granted by *Howell Jones Williams* for a term of twenty-one years from the 25th of March, 1848.

Mr. *Jessel*, Q.C., and Mr. *Speed*, for the infant Plaintiff:—

It is insisted that *Harriet Williams* and her trustees have acquired a title to the lands in question by possession for twenty years. We say that *Walter Jones Williams*, being the person really entitled to the land, was in possession; it may be he was in

possession as agent for his mother, but still he could not hold adversely to himself. How could he make an entry or bring an action against himself? Where the real owner of land divided the rents with a stranger for more than twenty years, it was nevertheless held that the real owner might maintain ejectment, for where two are in possession the law will adjudge the possession to be that of the person who has the right: *Reading* v. *Rawsterne* (1). That principle applies here: the possession of *Walter Jones Williams* must be deemed to be that of the real owner: *Woodroffe* v. *Daniell* (2).

Further, as regards that one of the farms which was leased for twenty-one years, time began to run only when the rent was first received by a person "wrongfully" claiming to be entitled to the reversion expectant on the determination of the lease: 3 & 4 Will. 4, c. 27, s. 9. Here the rents were not received by a person "wrongfully" claiming until after the death of *Walter Jones Williams;* during his lifetime he received them rightfully, although, under a mistake, he accounted for them to his mother. Therefore, as regards this farm, the Plaintiff is not barred.

Mr. *Southgate*, Q.C., and Mr. *Townsend*, for the trustees of the will, were not called upon.

LORD ROMILLY, M.R.:—

I am satisfied that this was an adverse possession the whole time. In the first place, I am of opinion that the possession of the agent is the possession of the principal, and that in this case the Rev. *Walter Jones Williams* could not have made an entry as long as he was in the position of agent for his mother, and that he was not in possession, and could not get into possession, or make any entry for that purpose, without first resigning his position as her agent; and then he must have written to his mother, saying: "The property is mine; I claim the rents, and I shall apply the rents for my own purposes;" and thereupon he might have made an entry, and so would have altered the position of principal and agent. That, in my opinion, is an answer to all the cases cited, and to the argument founded on them, that he must have made

(1) 2 Ld. Raym. 829. (2) 7 Jur. 959.

M. R. 1871 WILLIAMS v. POTT.

an entry, and that he could not make an entry so long as he was agent; the possession of the agent being the possession of the principal.

The other argument—that the word "wrongfully" excludes the receipt by mistake, or any matters of that description, and must mean an intentional and improper claiming of the rent—I reject altogether; and I am satisfied that is not the true construction of the statute. It means a person not entitled, who makes a claim to the rents against the person who is entitled.

Therefore the consequence is, that the summons must be dismissed with costs.

Solicitors: Messrs. *Wilkins, Blyth, & Marsland;* Messrs. *Hurford & Taylor.*

M. R. 1871 July 13.

WALKER *v.* SELIGMANN.

*Practice—Administration Suit—Party served with Decree—Liability to Account—*15 & 16 *Vict. c.* 86, *s.* 42, *r.* 8.

The effect of service of a decree under 15 & 16 Vict. c. 86, s. 42, r. 8, is to bind the interest of the party served in the subject-matter of the suit, and not to impose on him any liability to account.

THIS was a suit instituted by legatees under the will of *Alexander Walker*, lately carrying on business in *London*, against the executors, for administration of the estate. A decree had been made and served upon (amongst other persons) *Margaret Grainger Walker*, a sister of the testator, and a beneficiary under his will; and, as was stated, she had come in under the decree and obtained leave to attend the proceedings.

It was alleged that part of the estate of the testator consisted of certain shares in the *Bank of Scotland*, which at the time of the death of the testator were, and still continued to be, standing in the name of *Margaret Grainger Walker*, who was resident in *Scotland*.

A motion was now made on behalf of the Defendants, the executors, for an injunction to restrain *Margaret Grainger Walker* from transferring or dealing with the shares in question.

Mr. *Anderson*, Q.C., and Mr. *Jones-Bateman*, in support of the motion:—

A decree has been made for administration of the testator's estate; and that being so, this is the proper forum for the determination of all questions relating to that estate: *Graham* v. *Maxwell* (1); *Lewis* v. *Baldwin* (2); *Innes* v. *Mitchell* (3). Miss *Walker* having been served with the decree, and having come in under it, is as much bound by the proceedings in the suit as if she had been originally made a party to it: 15 & 16 Vict. c. 86, s. 42, r. 8; and consequently the Court has ample jurisdiction to make the order asked.

LORD ROMILLY, M.R., said that he had always considered that the effect of the enactment 15 & 16 Vict. c. 86, s. 42, was to bind a party served with the decree in respect of his interest, and not to impose on him any liability to account. Suppose, for example, that a residuary legatee were indebted to the estate in a large sum, he could not, after being served with the decree, be compelled, upon motion or summons, to pay in the amount of that debt to the credit of the cause; but for that purpose the Plaintiff must make him a party to the bill, and pray specific relief against him, or else some independent proceeding must be taken to enforce the liability. His Lordship was, therefore, of opinion that this was not a proper application; and if Miss *Walker* would undertake not to part with the shares before the last seal, the motion would be refused with costs, without prejudice to any proceedings which the executors might be advised to take in the matter.

Mr. *Southgate*, Q.C. (Mr. *Ramadge* with him), for Miss *Walker*, gave the required undertaking.

Solicitors: Mr. *F. W. Hilbery*; Messrs. *Norris & Sons*.

(1) 1 Mac. & G. 71. (2) 11 Beav. 153.
(3) 1 De G. & J. 423.

M. R.
1871
July 8, 11.

In re DICKSON.
BLACKBURN *v.* DICKSON.

Assignment of Fund—Covenant for further Assurance—Specialty Debt.

A. assigned to the trustees of his marriage settlement an equitable interest in certain copyholds, with a covenant for further assurance. *A.* afterwards got himself admitted and sold the copyholds, and received the purchase-moneys and applied them to his own use:—

Held, that the trustees were entitled under the covenant to prove against his estate as for a specialty debt.

THIS was an adjourned summons, raising the question whether a sum of money claimed to be due from *William Henry Dickson*, deceased, whose estate was in the course of administration in the suit, was to be proved as a specialty or as a simple contract debt. The facts were as follows:—

By a settlement, dated the 3rd of March, 1806, made on the marriage of *Henry Dickson* and *Hannah* his wife (the father and mother of the deceased), certain copyholds, then the property of the intended wife, were settled upon trusts for sale and investment of the proceeds; and after certain trusts, during the life of the husband and wife, the trust fund was settled on the children of the marriage as *Hannah Dickson* should by deed or will appoint; and it was provided that the after-acquired property of the wife should be settled upon the like trusts. There were two children of the marriage, *William Henry Dickson* and *Mary Dickson*.

In 1831, Mrs. *Dickson* was admitted to other copyholds as the heiress of one of her sisters and the devisee of another. On the 30th of April, 1836, *William Henry Dickson* married *Sophia Wathen*. Previously to the marriage, and on the 27th of April, 1836, *Hannah Dickson* executed an appointment of all the property, subject to the trusts of the settlement of 1806, to *William Henry Dickson* and *Mary Dickson*, in equal shares. On the same day *William Henry Dickson* executed an indenture of settlement whereby, after reciting the appointment, and that under it *William Henry Dickson* was entitled to a moiety of the trust property subject to the indenture of 1806, he assigned to trustees all

his interest at law or in equity in the property appointed to him by his mother; and he covenanted with the trustees that he and all persons claiming under him would, upon the request of the trustees or trustee for the time being, but at the costs and charges of the trust premises, make, do, and execute, or cause to be made, done, and executed, all and every such further and other acts, deeds, matters, and things, assignments, transfers, and assurances whatsoever, for the better and more effectually assigning the premises thereinbefore assigned, or expressed and intended so to be, unto such trustees or trustee for the time being upon and for the several trusts, intents, and purposes therein and thereby expressed, declared, and contained of and concerning the same, or such of them as for the time being should be subsisting or capable of taking effect, as by the said trustees or trustee for the time being, or their or his counsel in the law, should be reasonably devised or advised and required.

Henry Dickson, the father, died in February, 1848.

On the 11th of December, 1849, *Hannah Dickson*, *William Henry Dickson*, and *Mary Dickson*, executed a deed, whereby, after reciting that the above-mentioned copyholds, being after-acquired property of *Hannah Dickson*, and as such subject to the trusts of the settlement of March, 1806, had not been surrendered to the trustees of that settlement, but still remained in the name of *Hannah Dickson*, and that it had been agreed by her and her son and daughter that such copyholds should no longer be subject to the trusts of that settlement, it was witnessed that *Hannah Dickson*, *William Henry Dickson*, and *Mary Dickson*, and each of them, declared and directed that no surrender of the said copyholds should be made to the trustees or either of them, but that the said copyholds should be no longer subject to the trusts of that settlement, but should be thenceforth absolutely released and discharged therefrom.

Hannah Dickson died on the 27th of April, 1850.

In 1854, *William Henry Dickson* was admitted to the copyholds as the heir of his mother, and sold the same for £4000, and applied the purchase-money for his own purposes. On the 8th of October, 1867, he died intestate and insolvent. Soon afterwards this suit was instituted by summons for the administration of his

M. R. 1871

In re Dickson.

Blackburn v. Dickson.

estate; and the trustees of the marriage settlement of the 24th of April, 1836, then first became acquainted with the fact of the deed of December, 1849, having been executed, and of the admission of *William Henry Dickson* to, and the sale of the copyholds by him, and they carried in a claim against the estate for a moiety of the purchase-money of the copyholds.

Sir *R. Baggallay*, Q.C., and Mr. *Faber*, for the trustees of the settlement, submitted that the covenant for further assurance created a specialty debt, and cited *Musson* v. *May* (1) and *Lomas* v. *Wright* (2).

Mr. *Swanston*, Q.C. (Mr. *A. E. Miller* with him), for simple contract creditors:—

First: The covenant is for further assurance upon the request of the trustees. No request has ever been made; therefore the covenant has not been broken.

Secondly: There can be no specialty debt unless there is a covenant to pay, or something equivalent: *Marryat* v. *Marryat* (3); *Courtney* v. *Taylor* (4); *Isaacson* v. *Harwood* (5); *Wynch* v. *Grant* (6). There is nothing here equivalent to a covenant to pay.

Sir *R. Baggallay*, in reply:—

The covenant is to do whatever is necessary for vesting the property in the assignees. The property, in the shape of money, got into the hands of the covenantor. What else ought he to have done with it than to have paid it over to the trustees? Is not the covenant, then, equivalent to a covenant to pay?

As to the necessity for making a demand, it is true that we made no demand on *William Henry Dickson* when he was alive, but we have, since his death, made a demand on his legal personal representatives, and that is enough.

July 11. Lord Romilly, M.R., after stating the facts as above, continued:—

The trustees of the settlement made on the marriage of *William*

(1) 3 V. & B. 194.
(2) 2 My. & K. 769.
(3) 28 Beav. 224.
(4) 7 Scott. N. R. 749.
(5) Law Rep. 3 Ch. 225.
(6) 2 Drew. 312.

M. R.
1871
In re DICKSON.
BLACKBURN *v.* DICKSON.

Henry Dickson now seek to prove against the estate as specialty creditors. This is opposed by the simple contract creditors; and the only question is, whether this covenant for further assurance, which I have read, created a specialty debt.

It is argued, that as a deed reciting a debt does not create a specialty debt unless it contains a covenant to pay it, so the recitals here can create no debt, which I assent to; but this is not that case. Then it is contended that a covenant for further assurance is merely a covenant to pay when called upon, and that *William Henry Dickson* was never called upon to pay, and no doubt this is true; but I think that this circumstance cannot avail him, or rather his estate, in this case, inasmuch as it was the duty of *William Henry Dickson*, without being applied to, to transfer this sum of money to the trustees of his marriage settlement; and if I were to hold that an application is necessary to create the obligation, I should be giving advantage to a man, and allow him to avoid paying a debt by fraudulently concealing an act of misconduct on his part.

I think, also, that the cases generally tend to this result—either that the covenant is nothing, or that it created a specialty debt. No one can doubt that if *W. H. Dickson* had been called upon to assign the money and refused, he would have been liable to an action on the covenant. Either the trustees knew of it, or they did not; if they did, their breach of duty cannot affect him; if they did not, the neglect of the duty he had to perform in handing over the money was, in my opinion, a breach of the covenant he had entered into to assure to the trustees of his settlement the money he had so acquired.

Solicitors: Messrs. *Hollingsworth, Tyerman, & Green;* Mr. *Downing.*

V.-C. M.

1871

May 21, 29, 30.

CROSSLEY *v.* ELWORTHY.

Voluntary Settlement—Settlor engaged in Speculative Transactions—Burden of proving Solvency—Debt incurred after Settlement—Damages recovered in Action.

A settlor, at the time of making a voluntary settlement, made a statement of his assets and liabilities, shewing a balance in his favour. He was incurring heavy liabilities as managing director of a company, and from transactions on the *Stock Exchange*. Nine months after the date of the settlement he called a meeting of his creditors, and laid before them a statement shewing himself to be insolvent, and subsequently he became bankrupt:—

Held, that the burden was upon him to shew solvency at the date of the settlement.

Semble, that damages recovered in an action commenced after the settlement for inducing the Plaintiff to become a member of a company by false and fraudulent misrepresentations made previously to the settlement must be taken into consideration in estimating the settlor's solvency at the date of the settlement.

THIS suit was instituted by *Joseph Crossley*, of *Halifax*, against *Frederic Thomas Elworthy*, his wife and children, and the trustees of a voluntary post-nuptial settlement, dated the 12th of June, 1866, for the purpose of having the settlement declared fraudulent and void as against the Plaintiff under the provisions of 13 Eliz. c. 5.

The settlor, on his marriage in 1854, had made a verbal promise to his father-in-law to make a settlement for the benefit of his wife and children when he should become entitled to any property capable of being put into settlement. On the death of his father, in 1860, he became entitled, together with his two brothers, to certain real estate subject to a life interest therein of his mother, and he thereupon entered into contracts with his brothers for the purchase of their interests in the property, and effected some insurances on his own life and that of his mother.

In the year 1860 he became connected with a company called the "*London and Colonial Company*," and by purchases made on several different occasions between the 13th of June in that year and the 2nd of September, 1862, he acquired fully paid-up shares in the company (which were of the nominal value of £100 each),

to the number of 180, for which he paid altogether £18,898 13*s.* 4*d.* He also became, and continued till after the date of the settlement to be, managing director of the company, and in that capacity incurred liabilities on its behalf to a very considerable extent. At the date of the settlement he was liable, as surety for the company, on a mortgage debt of £35,000, and also as indorser, without consideration, for the accommodation of the company, of certain bills of exchange drawn by the company and then current. These bills were stated to have been paid at maturity; but it appeared that his liability on this head never really ceased, inasmuch as fresh bills were continually issued, on some of which he was always liable as indorser. He was also largely engaged in speculative transactions on the *Stock Exchange*, and a statement was made out, and supported by the affidavit of accountants, shewing the gross total of these transactions during the years 1864, 1865, and 1866 to have amounted to £4,700,000. The correctness of this mode of estimating the extent of the transactions was, however, disputed, but it appeared that the result of the speculations was a loss to him of nearly £20,000.

In the year 1865 the company issued some additional shares, also of the nominal value of £100 each, and the Plaintiff, induced, as he alleged, by the misrepresentations as to the solvency of the company made to him by Mr. *Elworthy*, took up 500 of these new shares. He paid upon them at the time of issue, and subsequently, sums amounting altogether to £35,000. He also took up £6000 worth of debentures of the company, which had been issued to the amount of £60,000.

In October, 1865, Mr. *Elworthy* gave instructions to Messrs. *Gregory & Rowcliffes* to prepare the settlement in question, and it was prepared accordingly, and was executed on the 12th of June, 1866. It comprised the property derived from the settlor's father, together with the shares purchased from his brothers, some other real estate which he had himself purchased, some leaseholds, and the policies of assurance on his own life and on that of his mother. The property was settled upon trusts for himself and his wife during their joint lives and the life of the survivor, or during widowhood in case of the wife surviving, and after the determination of the life interests to uses in strict settlement in favour of

V.-C. M. 1871 CROSSLEY v. ELWORTHY.

the children of the marriage. The value of the property put into the settlement was disputed, but it appeared not to be less than £10,000. In consequence of the advice of the solicitors who prepared the settlement that it would be valueless unless the settlor were then solvent, a statement of his assets and liabilities was made out shewing a balance in his favour, excluding the property put in settlement, of £54,000. In this statement his shares in the company, and also some debentures taken up by him, and an unsecured debt of the company to him, were put down at their full nominal value.

On the 2nd of March, 1867, the Plaintiff, *Joseph Crossley*, presented a petition to wind up the company. Shortly afterwards resolutions were passed for a voluntary winding-up, and on the 16th of March, 1867, an order was made to continue the winding-up under supervision. Mr. *Elworthy* thereupon called a meeting of his creditors; and on the 27th of March, 1867, at the office of Messrs. *Lawrance, Plews, & Boyer*, who were then acting as his solicitors, laid before them a statement of his affairs, dated the 13th of March, 1867, shewing his debts to be £40,156, and his assets £19,750.

In May, 1867, the Plaintiff, *Joseph Crossley*, commenced an action in the Court of Exchequer against Mr. *Elworthy* for damages, alleging that he had been induced to take his shares in the company by his false and fraudulent misrepresentations as to its solvency. A verdict was obtained in the action for £35,000 and costs, and on the 8th of March, 1868, judgment was entered up for £36,252 8*s*. On attempting to put his judgment in force the Plaintiff found himself stopped by the settlement, and thereupon instituted the present suit to set it aside.

By his answer, Mr. *Elworthy* stated that, notwithstanding the verdict, he never had any intention to mislead the Plaintiff as to the position of the company, and that he believed it to be solvent till the year 1867, and that in the action it was inferred that he had knowledge of certain accounts and figures relating to the company, when he had not, in fact, such knowledge.

The Plaintiff, *Joseph Crossley*, died during the progress of the suit, and it was revived by his executors. In the progress of the liquidation of the company the amount remaining unpaid upon

the shares had been called up, and the executors of Mr. *Crossley* had paid the remaining £15,000 upon his shares. It appeared that the whole assets of the company, including the unpaid capital, would be insufficient to pay the creditors in full.

Mr. *Elworthy* was adjudicated a bankrupt on the 19th of June, 1868, but no steps had been taken to realise his property. He had five children living, all of whom were infants, and the suit was defended on their behalf.

The evidence of the Plaintiff was directed to shew that the balance-sheet made out at the time of the settlement did not truly shew Mr. *Elworthy's* position, and that, independently of the question whether the damages recovered in the action could be considered to be a debt at the time the settlement was made, his liabilities exceeded his assets at that time. At least one debt was traced as being due at the time of the settlement, and still remaining unpaid. It was admitted by the parties supporting the settlement that a deduction of £32,000 must be made from the balance appearing in the statement for the supposed value of the shares in the company, and for part of the value of the debentures; but the evidence was directed to rebut any suggestion of actual insolvency unless the debt recovered in the action were treated as a liability at the date of the settlement.

The suit now came on upon motion for decree.

Mr. *Glasse*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Charles Hall*, for the Plaintiffs:—

Independently of the question whether the damages recovered in the action can be treated as a debt, the fact of a man making a statement of his assets and liabilities, shewing himself to be insolvent only nine months after the date of a voluntary settlement, coupled with the fact that a statement he made at the time of the settlement shewed that he was then largely indebted, is sufficient proof of insolvency to set it aside: *Townsend* v. *Westacott* (1). Even the proof of actual solvency at the time of making the settlement would not protect it if made in contemplation of insolvency: *Spirett* v. *Willows* (2); and where there is actual insolvency it is not necessary to shew an intention to defraud creditors:

(1) 2 Beav. 340. (2) 3 D. J. & S. 293.

V.-C. M. 1871 CROSSLEY v. ELWORTHY.

Freeman v. *Pope* (1). A settlement may be avoided on the ground of shewing an intention to defeat future creditors, and a creditor subsequent to the date of the settlement may institute a suit to set it aside: *Barling* v. *Bishopp* (2). Marriage does not even support a fraudulent settlement: *Smith* v. *Cherrill* (3); *Bulmer* v. *Hunter* (4). Where a case of fraud or misrepresentation is set up, the remedy remains in equity even when it is barred by lapse of time at law: *Blair* v. *Bromley* (5).

Mr. *Freeling*, and Mr. *Ingle Joyce*, for the assignees in bankruptcy:—

The proper form of decree will be to declare the settlement void as against all the creditors: *Bulmer* v. *Hunter*; *Chamley* v. *Lord Dunsany* (6).

Sir *Roundell Palmer*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Marten*, for the infant Defendants:—

There are only two grounds for setting aside a voluntary settlement—actual fraud, or actual proved insolvency at the time of the settlement. That this is the law appears clearly upon the authority of *Skarf* v. *Soulby* (7), *Townsend* v. *Westacott* (8), and *Jenkyn* v. *Vaughan* (9). It is quite clear that this settlement was honest in intention, and, in fact, a case of fraud is not set up. The ground relied on by the Plaintiffs is insolvency, and unless the damages in the action are treated as a debt at the time the settlement was made, such insolvency cannot be proved. This is, however, an action of tort, in which it is impossible that the damages can become a debt till judgment is obtained; for until that is done they remain unliquidated: *Ex parte Wilmot* (10); *Martyn* v. *M'Namara* (11); *Richardson* v. *Horton* (12).

[They also referred to *Stephens* v. *Olive* (13).]

Mr. *De Gex*, Q.C., and Mr. *Rowcliffe*, for Mrs. *Elworthy* and the trustees, submitted their rights to the Court, and asked for their costs.

(1) Law Rep. 5 Ch. 538.
(2) 29 Beav. 417.
(3) Law Rep. 4 Eq. 390.
(4) Ibid. 8 Eq. 46.
(5) 5 Hare, 542.
(6) 2 Sch. & Lef. 174, App.
(7) 1 Mac. & G. 364.
(8) 2 Beav. 340.
(9) 3 Drew. 419.
(10) Law Rep. 2 Ch. 795.
(11) 4 D. & War. 411.
(12) 7 Beav. 112.
(13) 2 Bro. C. C. 90.

SIR R. MALINS, V.C.:—

The bill in this suit was filed by *Joseph Crossley*, who has died during the litigation. The suit has been revived and continued by his legal personal representatives. It is against *Frederick Thomas Elworthy*, his wife and children, and the trustees of a voluntary settlement executed by *F. T. Elworthy* on the 12th of June, 1866. The bill prays that it may be declared void as against the Plaintiff, under 13 Eliz. c. 5; but it is conceded on behalf of the Plaintiff that it must be so declared, if at all, as against the Plaintiff and all the other creditors.

The facts of this case bring out the policy of the law in a remarkable point of view with regard to those who, engaged in the transactions of life, take a large part of their property out of the reach of their creditors, and put it into settlement for the benefit of their families without valuable consideration.

The case of the Plaintiff is that, in the year 1865, he was induced, upon the recommendation of Mr. *Elworthy*, to take shares in the *London and Colonial Company*, involving payments to the amount of £35,000, and debentures to the amount of £6000 more; that he had faith in the assurance of Mr. *Elworthy*, who was the managing director, that the concern was in a solvent and flourishing state, while, in fact, it was in an insolvent, decaying, and perishing condition, and that he thereby lost the whole of the £35,000 and a great part of the £6000. That would be a very difficult case to make out; but it has already been decided in an action brought by Mr. *Crossley* against Mr. *Elworthy* in May, 1867, which, after a very long trial, resulted in a verdict, followed by judgment, for the full amount of £35,000 for the loss caused to Mr. *Crossley* by those fraudulent misrepresentations by which he had been induced to take the shares. There was no motion for a new trial, or to arrest the judgment, and a final judgment for £35,000 was entered up in the early part of 1868. Shortly after this Mr. *Elworthy* became bankrupt, but no debts have been proved against him, or proceedings taken against him, because it was known that there were no assets. When Mr. *Crossley* proceeded to enforce his judgment he was met by the voluntary settlement. It is an undisputed fact that it included property to a very considerable amount, for though the actual value is in dispute, it certainly

V.-C. M. 1871 CROSSLEY v. ELWORTHY.

was not less than £9000 or £10,000. Apart from the bankruptcy, he made, on the 13th of March, 1867, only nine months after the settlement, a statement of his affairs to be laid before his creditors. He did this at the office of Messrs. *Lawrance, Plews, & Boyer*, his then solicitors, who were most experienced, and competent to advise him in his then position. In their office this statement was afterwards, on the 27th of March, 1867, laid before his creditors. It appears by it that he was indebted to the extent of £40,156, and that his assets amounted to £19,750, and, therefore, that he was insolvent to the extent of £20,000 and upwards.

Now, considering that he had made a settlement only nine months previously, I think that state of things is sufficient to relieve those who desire to impeach the settlement from proving insolvency, and to throw upon Mr. *Elworthy* the burden of proving that he was in a position to make the settlement. The general policy of the Act of 13 Eliz. c. 5, is, that those who are engaged in the transactions of life, buying or selling, or otherwise indebted, are not, by means of a voluntary settlement, to take their property out of the reach of their creditors. If a man does under such circumstances make a settlement, it seems to me in the highest degree reasonable that upon him should be thrown the burden of proving that he was in a condition to make it when it was executed. I may, however, relieve the case of the point argued by Sir *Roundell Palmer*, that Mr. *Elworthy* had no fraudulent intention in making the settlement. I think it has been fully made out that he had long previously contemplated it, and had again and again expressed his intention to his father-in-law. But it is perfectly settled that a verbal promise before marriage to make a settlement adds nothing to the validity of a settlement made after the marriage. This consideration, however, only affects the morality of the present transaction.

Then the question is, whether Mr. *Elworthy* was in a position, on the 12th of June, 1866, which would justify him in putting a considerable part of his property into a voluntary settlement. First of all he was engaged very largely in speculative transactions on the *Stock Exchange* during the years 1864, 1865, and 1866, though it may be that the liability resulting therefrom is

over-estimated in the evidence of the accountants. But he incurred large risk from the variations in price between one settling-day and another; and I hold it to be impossible for any one so engaged to say with certainty that he is solvent or in a position to meet all his creditors. This, Mr. *Elworthy* could not do, and that is one ground of my judgment.

Then as to his position with regard to the company. I cannot have the question reopened which was decided in the action, that this company, in which he was engaged from 1865 to 1866, the period covered by the settlement, was in a state of insolvency, and that while he reckoned his assets engaged in that business to be of great value, they were of no value whatever, and I am bound to take the verdict of the jury in that action, that when he made those representations of its solvency, which the jury determined to be false representations, the company was not only insolvent but insolvent to his knowledge. It is an undoubted fact that he was under heavy engagements to this company.

[His Honour then discussed the question whether the liability upon bills of exchange indorsed or accepted by him for the company, continued during the period from the date of the settlement till the meeting of creditors was called, and concluded that there was no time between the beginning of 1866 and the meeting of the creditors during which he was not under heavy liabilities in respect of such bills of exchange. He then considered the facts relating to the statement of assets and liabilities made out at the time of the execution of the settlement, and characterised it as untrustworthy and erroneous, and without justification, and continued:—]

I therefore conclude, upon the facts before me, that it was perfectly plain to Mr. *Elworthy* that his liability was such that he had no particle of justification for executing the settlement.

Now, to test what are the circumstances under which a man is justified in making a large voluntary settlement on his family, I asked the learned counsel, during the arguments, whether any case is to be found in which this Court has upheld a voluntary settlement made on his family by a man who became insolvent shortly afterwards, and I received no satisfactory answer. Sir *Roundell Palmer* referred me to the authorities which are pro-

V.-C. M. 1871 CROSSLEY v. ELWORTHY.

minent and conclusive on the subject. There is a case which I have often referred to, as stating the doctrine of the Court, *Townsend* v. *Westacott* (1), which has received the sanction of Lord *Cottenham* in *Skarf* v. *Soulby* (2), and of every other Judge who has remarked upon it. In that case there was no positive proof of insolvency at the date of the settlement, but the settlor became insolvent not nine months but three years afterwards. Lord *Langdale*, in his judgment, every word of which applies to the present case, says (3): "In the first place it is alleged on the part of the Plaintiff that this deed was executed entirely without consideration: that is admitted. In the next place it is said that the settlor was largely indebted at the time; and of this there is strong evidence, which I shall presently notice. Being largely indebted he made this voluntary conveyance, and in less than three years afterwards he became absolutely insolvent. On these facts alone, provided they were properly put in issue and proved, I am of opinion that this conveyance ought to be set aside as fraudulent." I adopt every word of that, and I am of opinion that the broad and unquestionable fact that Mr. *Elworthy*, when largely indebted and largely engaged, put a large amount of property into settlement and shortly afterwards became insolvent, is conclusive against the settlement. Then Lord *Langdale* says (4): "There has been a little exaggeration in the arguments on both sides as to the principle on which the Court acts in such cases as these: on one side it has been assumed that the existence of any debts at the time of the execution of the deed would be such evidence of a fraudulent intention as to induce the Court to set aside a voluntary conveyance and oblige the Court to do so under the Statute of *Elizabeth*." Then he points out that the mere fact of a man having some debts owing is no objection to a deed, and continues:—"On the other hand, it is said that something amounting to insolvency must be proved to set aside a voluntary conveyance; this, too, is inconsistent with the principle of the Act, and with the judgments of the most eminent Judges. The evidence as to the value of *Westacott's* property when he executed the settlement I cannot rely on; it is brought forward many years after the witnesses had

(1) 2 Beav. 340.
(2) 1 Mac. & G. 364.
(3) 2 Beav. 343.
(4) Ibid. 344.

known it, and they speak to the value of the property without taking into consideration any charges that might be upon it; and I am not in the situation of knowing whether there were any charges upon it. Under the circumstances in which this case has been brought before me, if the married woman and infant had had the opportunity of meeting the evidence as to the existence of the debts at the time of the settlement, I should have been bound to make the decree which is asked for in the first instance. I cannot, however, under the circumstances, make such a decree as is asked; but the Plaintiff is, I think, entitled under the alternative prayer of his bill to try the validity of the settlement by an action at law; but if there are any difficulties which cannot be removed, I will direct a reference to the Master."

Therefore upon that case it is clear that, though the mere fact of a man being indebted is not fatal to a settlement, it is not necessary to prove actual insolvency, but if insolvency takes place shortly after the execution of the settlement that is enough. There may be an exception to this rule, where a man is perfectly solvent one year and insolvent the next, and if in this case it had been proved that between June, 1866, and March, 1867, there had been some unexpected loss, or something which could not have been reasonably reckoned upon when the settlement was executed, that would have brought the Defendant *Elworthy* within the exception, but no attempt was made to bring forward such a case.

Another case was referred to which is of the greatest authority, *Jenkyn* v. *Vaughan* (1). The marginal note correctly states the exact point decided; but I desire particularly to refer to the rules laid down by Sir *R. Kindersley* in his judgment. He says (2): "Now the statute of 13 Eliz. c. 5, which is referred to in this case, avoids deeds which are made with intent to defraud or delay creditors. The instrument must be made with the *intent to defraud* creditors. Now, no doubt, an instrument may be executed for the purpose of defrauding subsequent creditors; and, with regard to creditors being so at the time, it is established that it is not necessary to shew from anything actually said or done by the party that he had the express design by the deed to defeat creditors;

(1) 3 Drew. 419. 2 Jur. N.S. 109 (2) 3 Drew. 424. 2 Jur. N.S. 110

V.-C. M. 1871 CROSSLEY v. ELWORTHY.

but if he includes in it property to such an amount that, having regard to the state of his property, and to the amount of his liabilities, its effect might probably be to delay or defeat creditors, if the Court is satisfied of that, the deed is within the meaning of the statute. In cases where a subsequent creditor files a bill it occurs to me that much may depend on this (supposing there is no evidence of anything to shew the fraudulent intention, but the fact of the settlor being indebted to some extent), whether at the time of filing the bill any of the debts remain due which were due when the deed was executed. In such a case, as any of the prior creditors might file a bill, it appears to me that a subsequent creditor might do so too; but if at the time of filing the bill no debt due at the execution of the deed remains due, the distinction may be that then a subsequent creditor could not file a bill unless there were some other ground than the settlor being indebted at the date of the deed to infer an intention to defraud creditors. However, I do not find any such rule laid down, and I shall not take upon myself to lay it down positively. But if a subsequent creditor files a bill, and you can shew that the person who executed the deed, though indebted at the time he made it, has since paid every debt, it is very difficult to say that he executed the settlement with an intention to defeat or delay creditors, since his subsequent payment shews that he had not such intention. But it appears to me, in the absence of authority to the contrary, that a subsequent creditor may file a bill if any debt due at the date of the deed remains due at the time of the filing of the bill."

In the present case I have already pointed out that some debts due at the time of the settlement do remain unpaid.

This brings me to a part of the case on which much has been said on both sides, namely, whether the debt of Mr. *Crossley*, of £35,000, as proved in the action, can be taken into consideration. I am clearly of opinion that Mr. *Glasse* was right in saying that it was not necessary for him to rely upon that in order to invalidate the settlement. But I cannot bring myself to the conclusion that the liability to Mr. *Crossley* can be wholly disregarded I must, as I am bound by the verdict of the jury to do, attribute to Mr. *Elworthy* the knowledge that he had made erroneous statements to Mr. *Crossley* in 1865, and those erroneous statements made him liable

V.-C. M.
1871
CROSSLEY
v.
ELWORTHY.

for a debt which he did not calculate upon when he executed the settlement, for he did not know till 1867 that the action would be brought. But the result of the action was to prove him to have become indebted in 1865, when he made the false representations by which the liability was created. I do not say that the debt would have been sufficient of itself to invalidate the settlement, but it was a circumstance which, considering the way he was involved in transactions with this company, ought to have led him to pause. He received sound advice from Mr. *Rowcliffe*, that the settlement was valueless unless he was perfectly solvent, and he ought to have weighed his assets against his liabilities, and if he had done so he would have found his liabilities the heavier, for his assets were not worth consideration. On the whole, I am of opinion that the settlement is within the purview of the statute, and, as against creditors, utterly void, and I think the case one of the clearest I have seen. Mrs. *Elworthy* and the trustees must pay their own costs; and the guardians of the infant Defendants must pay the Plaintiffs their costs of the suit.

Solicitors: Messrs. *Emmets, Watson, & Emmet;* Messrs. *Linklater, Hackwood, Addison, & Brown;* Messrs. *Thomas & Hollams;* Messrs. *Gregory, Rowcliffes, & Rawle.*

FRITH *v.* CAMERON.

V.-C. M.
1871
June 7.

Settled Estate—Jurisdiction of Court—Interests of Infants—Residential Property—Mortgage to rebuild Mansion.

A residential estate of small extent was settled in strict settlement upon the settlor, his wife, and family, and power was given to certain trustees, during the minority of any person entitled to the rents and profits, to rebuild or repair the mansion-house, and to pay for the cost out of the rents and profits; and they also had power, with the consent of the tenant for life, to lease the property for ninety-nine years. The value of the estate to the settlor and his family depended chiefly upon the residence. Since the death of the settlor, his widow being tenant for life in possession, the house had become ruinous from the foundation having given way, and could only be rendered habitable by rebuilding on a new site:—

The Court, on bill filed by the widow, authorized the trustees to raise by mortgage of the settled property £5000 to be spent in rebuilding the resi-

V.-C. M.
1871
FRITH
v.
CAMERON.

dence, on being satisfied that the value of the estate, with the house, and subject to the mortgage, would not be less than if the house had been removed and the materials sold.

BY an indenture of settlement, dated the 22nd of May, 1863, *John Griffith Frith* granted an estate at *Minchinhampton*, in the county of *Gloucester*, consisting of a residential house and sixteen acres of land, to the use of himself for life, with remainder to the use of his wife *Caroline Frith* for life, with remainder to the use of certain trustees for his daughter *Caroline Barbara Blackwell* for her life, for her separate use, without power of anticipation; and after her decease, upon trust for her first and every other son in tail; and in default of such issue, in trust for all and every her daughters as tenants in common in tail general, with cross remainders between them; and in default of such issue, upon the like trusts and with the like limitations in favour of his daughter *Elizabeth Sarah White* and her issue; and in default of such issue of *Elizabeth Sarah White*, in trust for his daughter *Jane Louisa Frith* and her issue; with an ultimate trust in favour of the settlor, his heirs and assigns. And by the same indenture it was agreed and declared, that if any person who would (if that proviso had not been inserted) for the time being be entitled in equity to the possession or receipt of the rents and profits of the settled property should be under the age of twenty-one years, the trustees of the settlement should enter into possession or receipt of the rents and profits, and should, during the minority of such person, continue such possession or receipt of rents and profits, and manage, or superintend the management of, the same hereditaments, with full power, amongst other things, to erect, pull down, and repair houses and other buildings or erections, and generally to deal with the premises as they or he might do if they or he were the absolute owner or owners thereof, and should from time to time during such minority, by and out of the rents and profits of the said hereditaments (including the produce of the sale of timber and underwood), pay and discharge the expenses incurred in or about such management, or in the exercise of any of the powers therein contained, or otherwise in respect of the premises, and all outgoings not payable by any tenant or other person. The settlement also contained a power for the settlor during his life,

and after his death, for *Caroline Frith* for her life, and after her death, for the trustees of the settlement, with the consent in writing of any person who should for the time being be entitled to the rents and profits of the settled property as equitable tenant for life in possession, and at the discretion of the trustees during the minority or respective minorities of any person or persons who, if of full age, would for the time being be entitled in equity to the actual possession, or to the receipt, of the rents and profits of the settled property, or any undivided share thereof as tenant or tenants in tail by purchase, by deed to lease the settled property for any term not exceeding ninety-nine years for the purpose of building or repairing messuages or buildings, or of making improvements. And the settlement also contained a power of sale and exchange; but there was no power to raise money by mortgage of the settled property.

By an indenture dated the 5th of June, 1866, and indorsed on the settlement, a plot of land of rather more than seven acres in extent was added to the property in settlement.

John Griffith Frith, by his will, dated the 23rd of May, 1866, gave his real and leasehold estates not otherwise disposed of upon trust for sale, and to apply the proceeds of the sale, together with his residuary personalty, to make up three several sums of £5000, and to invest the residue, and pay the income to his wife for life, and, subject thereto, to apply the sums of £5000 and the residue after the death of his wife upon certain trusts for the benefit of his three daughters and their issue.

The testator made a codicil to his will, dated the 17th of October, 1868, whereby he directed his trustee to apply the sum of £2000 towards diverting a road which ran through part of the settled property, and directed the income of his residue to be divided into four parts during the life of his wife, and subject to making up an annuity to her of £4500, to be paid as to one-fourth to one of his sons-in-law, and as to one-fourth to his daughter *Jane Louisa Frith*, and as to the remaining two-fourths to his other son-in-law. *John Griffith Frith* died on the 7th of November, 1868, and his widow had since been in occupation of the settled property.

The mansion-house, which was called "*Highlands*," had been

V.-C. M. 1871 FRITH v. CAMERON.

improved and enlarged at great expense by the settlor as a residence for himself and his family. It was built on the brow of a hill, the front part resting on a loose rubbly soil, and the back part on rock. This rubbly soil had been for some time subsiding, and the front of the house was in consequence giving way, and all attempts to repair it being ineffectual, it became necessary to pull the house down and rebuild it on a fresh site.

The estimated cost of rebuilding was £5000, and inasmuch as, under the circumstances, there were no funds applicable to the purpose under the will or the settlement, the present bill was filed by Mrs. *Frith*, the widow, against the trustees and the other beneficiaries. It prayed for a declaration that it was for the benefit of all the *cestuis que trust* interested or to become interested under the settlements, that the trustees should raise by mortgage of the hereditaments, subject to the trusts of the settlement, such sum not exceeding £5000 as might be required for the purpose of removing and rebuilding the house, and for consequential directions.

There were also certain small pieces of land which had at various times been purchased by the settlor and thrown into the settled estate, and were of no material value except as additions thereto; but by some accident they had not been conveyed upon the trusts of the settlement, and had, consequently, become legally vested in the trustees of the will; and the bill prayed also a declaration that it was for the benefit of the parties interested that the trustees of the will should convey these plots of land to be held upon the trusts of the settlement.

It appeared that there was some difficulty in identifying the exact pieces of land.

There was evidence by a competent valuer, tending to shew that the value of the estate charged with the £5000, but with a residential house upon it, would be as great as or greater than the estate without a house.

On the 1st point:

Mr. *Glasse*, Q.C., and Mr. *Lindley*, for the Plaintiff:—

A sale is a more serious interference with property than a mortgage, and yet even that has been directed under some circum-

stances: *Gamstone* v. *Gaunt* (1). The terms of the power itself shew that it was contemplated that the house might be required to be rebuilt, and, in any case, the same result can be attained, though less beneficially for the infants entitled in remainder, by means of a building lease for ninety-nine years. Where a person has died leaving a house in course of erection, the Court has allowed the cost of completing the building to be made a charge upon the estate: *Hibbert* v. *Cook* (2); *Dent* v. *Dent* (3); and it is clear that the intention of the settlor will be carried out by making a decree in terms of the prayer.

Mr. *Cotton*, Q.C., and Mr. *Borrett*, for the trustees of the settlement:—

If the decree asked for is made, it must be done wholly irrespective of the power, for that only extends to the application of money derived from rents and profits and the sale of timber. It should be remembered that nothing can prevent a mortgagee from calling in his mortgage-money. In *Hibbert* v. *Cook* the Court refused to allow a charge even for the necessary expense for keeping dry rot out of a house.

SIR R. MALINS, V.C.:—

I think that, under the peculiar circumstances of the case, it will be for the benefit of all parties that the decree asked for should be made. The property settled was an estate acquired by the settlor as a residence for himself and his family. The house is tumbling down, and I think it so expedient that it should be rebuilt, that, under the general jurisdiction of the Court, and on production of more complete evidence that the value of the estate with a new house, and subject to the charge proposed to be created, will not be less than the mere agricultural value of the estate if the present house were pulled down and the materials sold, I shall declare it to be for the benefit of the infants entitled in remainder that the money should be raised.

Further evidence was afterwards put in on this point.

(1) 1 Coll. 577. (2) 1 S. & S. 552.
(3) 30 Beav. 363.

V.-C. M. 1871 FRITH v. CAMERON.

On the 2nd question:

Mr. *Glasse*, Q.C., and Mr. *Lindley*, for the Plaintiff:—

If this were a bill to rectify the settlement, these plots of land would be added to the settled property; and that being so, it is clearly for the benefit of the infants that they should be treated as part of it, and the Court having power to compromise the interests of infants, can make a decree accordingly: *Brooke* v. *Lord Mostyn* (1). In that case, although the decree of the Lords Justices was reversed by the House of Lords, the principle on which they based their decision was maintained.

[The VICE-CHANCELLOR:—The recent case before me of *Castle* v. *Fox* (2) was somewhat similar.]

Mr. *F. J. Turner*, for the trustees of the will.

SIR R. MALINS, V.C.:—

I think it is most expedient, and for the benefit of all parties, that there should be a decree in terms of the prayer, subject to my being satisfied by evidence of the value of the estate. The costs will be added to the charge.

Solicitors for all Parties: Messrs. *White, Borrett, & Co.*

(1) 2 D. J. & S. 373. 10 Jur. N.S. 1114 (2) Law Rep. 11 Eq. 542.

POWELL *v.* RILEY.

V.-C. M.
1871
June 9.

Specific Bequest of Personalty—Devise of Real Estate to pay Debts—Exoneration of Personalty—Contribution for Debts.

A testator bequeathed all his household goods and furniture, farming stock, money, goods, chattels, and effects, and all other his personal estate, to his wife absolutely, he then devised a freehold estate, called the *Rye Crofts*, for sale and payment of debts, and the surplus to his wife; and he devised another freehold estate to his wife absolutely; and other estates to his wife for life, with remainders over. The *Rye Crofts* estate was insufficient for payment of debts:—

Held, that the bequest of personalty to the wife was specific, and that such bequest and the specifically devised real estates must contribute rateably to the payment of the surplus debts for which the *Rye Crofts* estate was insufficient.

20 L. J. Ch. 678

THOMAS PASKIN, by his will, dated the 7th of July, 1856, gave and bequeathed all his household goods and furniture, live and dead farming stock, money and securities for money, goods, chattels, and effects, and all other his personal estate, to his wife, the Defendant *Ann Paskin*, for her absolute use and benefit. And he gave and devised certain closes of land known by the name of the *Rye Crofts*, containing about sixteen acres, situate at *Fradley*, unto the Defendants *J. Riley* and *W. S. Shaw*, their heirs and assigns, upon trust, as soon as conveniently might be after his decease, to make sale and absolutely dispose of the same, either by public auction or private contract, and to stand possessed of the moneys to arise from such sale upon trust, in the first place, to pay thereout the charges and expenses attending such sale, and in the next place to pay, satisfy, and discharge all his just debts due and owing on mortgage bond or simple contract, and all his funeral and testamentary expenses, and after the payments aforesaid upon trust to pay the surplus residue (if any) unto his said wife *Ann Paskin*, her executors, administrators, or assigns, for her and their sole use and benefit. And he further gave and devised his freehold messuage or dwelling-house, homestead, garden, and appurtenances situate at *Fradley*, and then occupied by him, and also two closes of copyhold land situate at *Fradley*, called the *Old Field*, containing about eight acres, and the *Cow Hill*, containing about

V.-C. M. 1871 POWELL v. RILEY.

four and a half acres, to his wife, her heirs and assigns, for ever. And he further gave and devised all the residue of his messuages, lands, hereditaments, and real estate whatsoever, freehold, leasehold, or copyhold, to his wife for her life, without impeachment of waste. And after her decease he further gave, devised, and bequeathed all those two messuages and premises, and all the lands and hereditaments which were then held by him under a lease from the Dean and Chapter of *Lichfield*, and all the unexpired term therein, and also a copyhold messuage or dwelling-house, situate at *Mill End*, and also two closes of copyhold land, containing about eleven acres, and all other the leasehold and copyhold hereditaments devised and bequeathed to him by his aunt *Mary Hall*, unto his nephew, the Defendant *J. Paskin*, his heirs, executors, administrators, and assigns, for ever, charged with the several legacies therein mentioned. And from and after the decease of his wife he further gave and devised the dwelling-house, with the outbuildings and appurtenances, containing about five acres, unto his nephew the Defendant *Thomas Fisher*, his heirs and assigns, for ever, and he appointed *J. Riley*, *W. S. Shaw*, and *Ann Paskin* executors of his will.

The testator died in June, 1866, and the will was proved by *J. Riley* and *Ann Paskin;* the other executor, *W. S. Shaw*, renounced the office of trustee and executor by deed dated in January, 1868.

The testator was at the time of his death possessed of or entitled to some personal estate, and also to considerable real estate, but the *Rye Crofts* estate, specifically devised for payment of debts, was not sufficient for that purpose.

The suit was instituted by creditors of the testator for the administration of his estate; and the question now raised was, out of which property the surplus debts were to be paid.

Mr. *Glasse*, Q.C., and Mr. *Villiers*, opened the case for the Plaintiffs, who were mortgagees of the *Fradley* estate, stating that it was immaterial to them out of what fund their debt was paid.

Mr. *Horton Smith*, for the widow of the testator:—

The bequest, in the first instance, of household goods and fur-

niture, farming stock, money, and all the personal estate, to the widow is a good specific bequest; and this being followed by a devise of a particular freehold estate for payment of debts, exempts the personal estate from liability to debts. This was held in *Greene* v. *Greene* (1), where the Master of the Rolls said there must be a clear intention expressed in, or to be extracted from, the will, that the real estate is to be the primary fund for payment of debts. In *Michell* v. *Michell* (2) it was held that the word "effects," coupled with the context, operated as a specific bequest of the personal estate, and that the same was discharged from liability to debts. The same principle was acted upon in *Coote* v. *Coote* (3), *Tower* v. *Lord Rous* (4), *Gilbertson* v. *Gilbertson* (5), and *Lance* v. *Aglionby* (6). The test, as stated by Sir *W. Grant* in *Tower* v. *Lord Rous*, is, whether you can discover an intention to give the personal estate as a specific bequest, as distinguished from a gift to the executor, or as a residue: *Jarman* on Wills (7). The distinction here is manifest, since there is a devise of real estate for the express purpose of paying debts. This is, in effect, an exemption of the personal estate from the liability to pay debts. The intention of the testator is perfectly clear on this will, and the proper way to deal with the funds is to hold that the personal estate is specifically bequeathed, and that the gifts of the realty and the residue must contribute to the surplus debts which the *Rye Crofts* estate is insufficient to pay.

Mr. *Cotton*, Q.C., and Mr. *Haddan*, for the persons to whom the freehold and leasehold estates were given in remainder:—

We admit that the *Rye Crofts* estate is the primary fund for payment of debts; but the surplus must come out of the personal estate, and till that is exhausted you cannot have recourse to the specifically devised real estate. The only intention of the testator discoverable upon this will is, that the *Rye Crofts* estate is to pay the debts; but that intention cannot be fulfilled, because the estate is insufficient for the purpose; consequently you must resort

(1) 4 Madd. 148.
(2) 5 Ibid. 69.
(3) 3 J. & Lat. 175.
(4) 18 Ves. 132.
(5) 34 Beav. 354.
(6) 27 Ibid. 65.
(7) 3rd Ed. vol. ii. p. 626.

V.-C. M. 1871 POWELL v. RILEY.

to the ordinary rule, that the personal estate is the first fund for satisfying debts. The case of *Taylor* v. *Taylor* (1) is decided upon this principle. There the testator, after directing all his debts to be fully paid, devised his real estate to several different persons, and charged certain of them with specific sums; and it was held that these estates as well as the others were charged with the debts. In the cases cited the estates specifically devised for payment of debts were sufficient for that purpose, and the question was not raised as to which estates were to bear the burden of the surplus debts; and, in the case of *Tower* v. *Lord Rous* (2), Sir *W. Grant* expressed a strong opinion against the exoneration of personal estate. There is no intention expressed here that in case the *Rye Crofts* estate is insufficient, then that the personal estate is not to bear its usual liability. There is no express direction that the personal estate is to be exonerated from payment of debts, and in the absence of such express direction the personal estate is always the primary fund for that purpose. The gift of personalty is in the common form of such bequests, and includes all those articles which are usually found in a residuary clause; and to all intents and purposes it is a gift of residue, though not designated under that term.

SIR R. MALINS, V.C.:—

The question which I am to decide is, whether the testator has made such a bequest of his personal property as to amount to a specific bequest, so as to exonerate it from primary liability to pay his debts, funeral and testamentary expenses.

I must attribute to this testator the knowledge that his personal estate was the primary fund for the payment of his debts; and with that knowledge he makes his will in these terms:—[His Honour then stated the effect of the will.] If the will had stopped after the bequest of all his household goods and furniture, live and dead farming stock, money and securities for money, goods, chattels, and effects, and all other his personal estate, to his wife for her absolute use and benefit, it would not, of course, have exonerated the personal property from the primary liability to

(1) 6 Sim. 246. (2) 18 Ves. 132.

pay debts; but the testator proceeds to devise the *Rye Crofts* estate upon trust for sale, and the trustees are to pay out of the proceeds all his debts; and having so devised the *Rye Crofts* estate, he further devises his freehold house at *Fradley*, and the *Old Field*, and the *Cow Hill*, to his wife absolutely; and he gives other freehold, copyhold, and leasehold estates to his wife for life, with remainders over. It is contended for the remaindermen that they are not bound to contribute, until the personal estate is exhausted, to the payment of so much of the debts and expenses as *Rye Crofts* or the properties specifically devised for the payment of debts should prove insufficient to pay. *Rye Crofts* is insufficient; and the question, therefore, is, whether recourse is next to be had to the personal estate, or whether there should be a contribution of personal estate and specifically devised real estate—that is, simply according to their respective value, which would be the ordinary course of administration.

As a general rule, a bequest of general personal estate is not specific, because it is usually given in the form of residue, but upon the construction of wills, the rule is, what is the intention of the testator? Now what intention has this testator shewn? He evidently thought the *Rye Crofts* estate, which is devised for the payment of debts, would be sufficient for that purpose, and if there should be a surplus he gives that surplus to his wife. Therefore he begins his will by giving his household furniture, not in the form of residue, but as a specific bequest. I know no reason whatever, and I know of no authority that decides that the words, "I give my household furniture," is other than a specific bequest. There is no reason why all the articles mentioned in that first bequest should not be given specifically as well as anything else. Now the rule being to carry the intention of the testator into effect, I am clearly of opinion in this case that the testator has shewn a decided intention that his wife should take the personal property of every description for her own absolute benefit, he having provided another fund for the payment of his debts, thinking that fund was sufficient. She was to hold them free from debts altogether. He then gives her a real estate in fee, and gives her other real estates for life, with remainders over. The result being that the *Rye Crofts* estate is

V.-C. M. 1871 POWELL v. RILEY.

insufficient, the question simply is, as between the wife and the remaindermen of the estates, of which she is tenant for life, whether the wife, who is specific legatee, as I consider, of this property, is to give up all the personal estate bequeathed to her? The rule is very clear—that where there are specific bequests, and the general personal estate is insufficient to pay debts, funeral and testamentary expenses, the specific legatees must contribute rateably out of the things specifically bequeathed. The question is, whether the personal estate, the estate devised to the widow in fee, and the estates of which she is tenant for life, must not all rateably contribute to pay the deficiency, or whether the widow is to pay the whole of it to the exoneration of the estate of which she is tenant for life only? There is no magic in these things: it is a question of intention, and all the cases concur in this: If the Court finds an intention on the part of the testator to exonerate his personal estate, it is not necessary to say: "I give the property discharged from my debts." It is not necessary to use those exact words; it is quite sufficient if you collect from the whole will an intention to exonerate. Could any testator shew more distinctly his intention than this one has done, when he says, "I give all my personal property to my wife for her own absolute benefit," and being silent about debts; and then goes on to provide a distinct fund or estate for the payment of the debts, which fund or estate he presumes will be sufficient. I think that is quite enough to shew he intended the wife to take the property absolutely, discharged from the liability of the debts. If he was in a situation to give it to her, it would be an act of injustice that she should lose her specific bequest for the benefit of another property not more specifically bequeathed than this.

That being perfectly clear as to the intention, is there anything to be found in the cases opposed to this? There is only one case of that kind relied on, which is *Taylor* v. *Taylor* (1), but it is impossible to read that will without seeing that Sir *Lancelot Shadwell* looked on it as a residuary clause where a testator says, "I give my household furniture, farming stock, and the residue of my estate." Sir *Lancelot Shadwell* thought this was only part of the residue: the residue being that which

(1) 6 Sim. 246.

remained after payment of debts, funeral and testamentary expenses; it meant only residue, and no specific bequest whatever. There is a long list of authorities which, in my opinion, proceed upon principles of justice, and cannot admit of any doubt. It is very true that in the case of *Tower* v. *Lord Rous* (1) the decision of Sir *William Grant* was adverse to the exoneration of the personal estate; but he gives his reasons, and says: "It is contended that the inference might arise from the manner of giving the personal estate, but there is nothing except the common residuary clause, 'all the rest and residue of my personal estate of what nature or kind soever.' Not 'all my personal estate'—not 'all which I have not hereinbefore disposed of,' or any other of those forms held to denote an intention to give the personal estate as a specific bequest. Indeed, here the residuary legatee could not take specifically what might be left, after separating from the personal estate the particular articles given to the widow, as it is admitted there is a charge of uncertain amount." Therefore Sir *W. Grant* said, "if the bequest had been in any of these forms, it would have been specific, and exonerated from the payment of debts, except as contribution in case of a deficiency of the fund provided for payment of debts." Then the cases of *Michell* v. *Michell* (2), and *Greene* v. *Greene* (3), I think may be taken as cases proceeding generally on the ground taken by Sir *W. Grant* in *Tower* v. *Lord Rous*. There are also the cases of *Lance* v. *Aglionby* (4) and *Gilbertson* v. *Gilbertson* (5). Those are cases in which the testator says, "I give my wife my personal estate for her absolute use and benefit," and then proceeds to provide another fund for the payment of his debts. The fund provided was sufficient, but that would make no difference in the result, except that when it is sufficient you do not resort at all to a contribution.

Now, in the case of *Gilbertson* v. *Gilbertson*, the Master of the Rolls adopted his own decision in *Lance* v. *Aglionby*, and said: "The rule is, whether you can discover an intention to give the personal estate as a specific bequest as distinguished from a gift to the executor, or as a residue."

(1) 18 Ves. 132, 138.
(2) 5 Madd. 69.
(3) 4 Madd. 148.
(4) 27 Beav. 65.
(5) 34 Beav. 354.

V.-C. M. 1871 POWELL v. RILEY.

Therefore, upon these authorities, every one of them, in my opinion, more or less applicable, *Greene* v. *Greene* (1), *Michell* v. *Michell* (2), *Lance* v. *Aglionby* (3), and *Gilbertson* v. *Gilbertson* (4), I come to the conclusion that there is here a distinct intention to give the personal estate specifically, and to exonerate it, as shewn by the fact that he provided for the payment of the debts, and if that provision had been sufficient the case would have fallen exactly within *Gilbertson* v. *Gilbertson;* but it being insufficient, the consequence will be, instead of the personal estate being the primary fund, you can only resort to it for a contribution. Of course, the passage from *Jarman* can only be read, and has been read, as part of an argument; but as *Jarman,* in the passage which has been referred to, has stated the result of the cases, I think I may fairly say that I entirely concur in his conclusion, and I will adopt his expression (5), and state that, in my opinion, the result of the cases is, that whenever the personal estate is bequeathed in terms as a whole, and not as a residue, and the debts, funeral and testamentary charges, are thrown on the real estate, this constitutes the primary fund. That is the exact case here; unfortunately it turns out the fund provided is insufficient. The consequence is, that every specifically devised and bequeathed fund must contribute rateably; the personal estate, the estate specifically devised to the wife, and the estates devised to her for life, with remainders over. Those three things must contribute to the deficiency.

Solicitors for the Plaintiffs: Messrs. *Sharp & Ullithorne.*

Solicitors for the Defendants: Messrs. *Young, Maples, & Co.;* Mr. *Somerville.*

(1) 4 Madd. 148.
(2) 2 Ibid. 69.
(3) 27 Beav. 65.
(4) 34 Ibid. 354.
(5) Jarm. on Wills, 3rd Ed. vol. ii. p. 630.

In re KILVERT'S TRUSTS.

V.-C. M.
1871
June 30.

Charitable Gift — Insufficient Description — Intention to benefit a particular Object—Cy-près—Division between two Societies—Evidence of surrounding Circumstances.

Where in a gift to a charity the object of the gift is imperfectly described, and uncertainty as to it in consequence arises, evidence of the donor having been interested in or a subscriber to any particular society is admissible to shew what was in her mind when making the gift.

A testatrix gave a legacy to "the treasurer for the time being of the fund for the relief of the widows and orphans of the clergy in the diocese of *Worcester*." At the date of the will there was no society so named, but there was a society which had formerly fulfilled that office for the diocese, but had lately been restricted, both in name and in its operations, to the archdeaconry of *Worcester*. The testatrix and her family had subscribed to this society in both its conditions. There was also a similar society, with which the testatrix had not been connected, in the archdeaconry of *Coventry*, which formed the rest of the diocese :—

Held, that the testatrix must be presumed to have given the legacy to the *Worcester* society in the belief that it extended to the whole diocese, and it must be considered as a gift to an object, not to a society, and the legacy must be divided between the societies.

Revd by L.J. 7th 170

FRANCES MARIA KILVERT, of the *College Green, Worcester*, by her will, dated the 7th of July, 1868, gave a legacy of £10,000 "to the treasurer for the time being of the fund for the relief of the widows and orphans of the clergy of the diocese of *Worcester*, to be applied by him for the benefit of that charity."

The testatrix died on the 26th of November, 1870.

The diocese of *Worcester* previously to 1837 comprised only the present archdeaconry of *Worcester*, and was co-extensive with it; but in that year the archdeaconry of *Coventry* was taken from the diocese of *Lichfield* and *Coventry*, and added to that of *Worcester*, and from that time the diocese consisted of the two archdeaconries of *Worcester* and *Coventry*.

About the year 1777 a society was founded at *Worcester* bearing the name of the "*Society for the Relief of the Widows and Orphans of Poor Clergymen, &c., &c., within the Diocese of Worcester.*" This society previously to the enlargement of the diocese relieved cases from any part of it, and after the enlargement

V.-C. M. 1871

In re KILVERT'S TRUSTS.

continued to relieve cases from the whole of the enlarged diocese.

Subsequently, however, the rules were altered so as to restrict the operations of the society to the archdeaconry of *Worcester*, and the name was changed to that of the "*Society for the Relief of Clergymen's Widows and Orphans and Necessitous Clergymen in the Archdeaconry of Worcester.*"

About the year 1777 there was also established, in the archdeaconry of *Coventry*, a society called the "*Charity for the Relief of Necessitous Clergymen, their Widows and Children, within the Archdeaconry of Coventry.*" It relieved cases from that archdeaconry only.

There was no society having a name similar to that mentioned in the will, or at the present time extending its operations to the whole of the diocese. The executors accordingly paid the £10,000 into Court. The treasurer of the society for the archdeaconry of *Worcester* now petitioned for payment of the legacy to that society.

It was in evidence that the testatrix, her father and mother, had all been annual subscribers to the *Worcester* society, and that the testatrix had increased the subscriptions previously paid. The fact of the restriction of the society to the archdeaconry was made known simply by the publication in the annual report for the year in which the change took place, of the rules in their altered form, and there was nothing in that report prominently directing the attention of those who received it to the change. It appeared that the testatrix had regularly received the annual report, but there was nothing to shew whether the change in the constitution of the society was brought to her knowledge.

With a view of assisting the Court in apportioning the fund, an affidavit was filed on the part of the *Coventry* society to shew that the number of the benefices in the two archdeaconries was in the proportion of seven in *Worcester* to five in *Coventry*.

Mr. *Cotton*, Q.C., and Mr. *C. Walker*, for the Petitioner:—

The intention to make a gift to one society only is plain from the fact that the legacy is to be paid "to the treasurer for the time being," and though the *Worcester* society is not accurately de-

scribed, the designation is sufficiently near to exclude any other society.

Evidence is admissible of the surrounding circumstances to shew what the testatrix could have had in her mind: *Wilson* v. *Squire* (1); and the fact that she and other members of her family had subscribed to and were well acquainted with the *Worcester* society, though not evidence of intention, is admissible as shewing such surrounding circumstances: *In re Clergy Society* (2); *Still* v. *Hoste* (3); *Jarman* on Wills (4).

Mr. *Glasse*, Q.C., and Mr. *Vaughan Hawkins*, for the *Coventry* society:—

The rule as to the admissibility of parol evidence is laid down in *Doe* v. *Hiscocks* (5), and *Bernasconi* v. *Atkinson* (6), and it is clear that evidence as to former subscriptions is inadmissible. The description is not accurate for either society, but distinctly expresses the object of benefiting the whole diocese, an object which the *Worcester* society continued to fulfil for some time after the enlargement of the diocese. Under these circumstances, the *Worcester* society having restricted its operations below the expressed object of the bounty of the testatrix, the Court will carry out her intention by dividing the legacy between the two societies: *Simon* v. *Barber* (7); *Bennett* v. *Hayter* (8). The Court will carry out the object even if, in doing so, it becomes necessary to disregard the machinery she wished to employ: *Loscombe* v. *Wintringham* (9); *Re Maguire's Trusts* (10).

[The VICE-CHANCELLOR referred to *Blundell* v. *Gladstone* (11).]

Mr. *Cotton*, Q.C., and Mr. *Warmington*, for the residuary legatees.

Mr. *Cotton*, in reply, referred to *Drake* v. *Drake* (12).

(1) 1 Y. & C. Ch. 654.
(2) 2 K. & J. 615.
(3) 6 Madd. 192.
(4) 3rd Ed. vol. i. p. 406.
(5) 5 M. & W. 363, 368.
(6) 10 Hare, 345.
(7) 5 Russ. 112.
(8) 2 Beav. 81.
(9) 13 Ibid. 87.
(10) 18 W. R. 623.
(11) 11 Sim. 467.
(12) 8 H. L. C. 172.

V.-C. M. 1871 *In re* KILVERT'S TRUSTS.

SIR R. MALINS, V.C., after reading the words of the gift, continued:—

There is one rule without exception in construing a will—which is, that wherever a bequest, whether made to a person or a charity, is perfect and unequivocal in all its parts, no parol evidence is admissible to explain it; and if in the present case there had been a society completely answering the description in the will, that society must have taken the legacy. The testatrix expresses her gift to be to a society giving its funds for the benefit of the whole diocese of *Worcester*. If she had expressed her intention to benefit the archdeaconry of *Worcester*, Mr. *Cotton* must have prevailed, for there is a society fulfilling that object.

[His Honour then referred to the facts of the case, and continued:—]

It is not shewn that the testatrix was aware of the change restricting the objects of the society to the archdeaconry. It is probable that she did know of it, for she received the reports, and may have read them; but the knowledge has not been brought home to her, and there is a total want of evidence that she was informed.

It is clear that when there are two societies, and it is uncertain on the face of the will which of them is entitled to a gift, evidence is admissible to shew which of them was intended. Then, there being no evidence that the testatrix knew of the restriction of the operations of the society to the archdeaconry, and the subscriptions of the family having continued through the period when the society operated for the benefit of all the diocese, can I attribute to her an intention to exclude a clergyman from the benefits of her bounty who happens to die within the diocese but not within the archdeaconry?

I collect from the words of the will an intention to make a gift to the *Worcester* society, but only in the belief that it extended its operations to the whole diocese; and I find no warrant for excluding any part of it. There is no society at present completely answering her description, and I am bound to hold that she intended to make her gift for the benefit of the whole diocese; and I am, therefore, of opinion that I must treat the legacy as being given, not to a charitable society, but for a charitable object, to which I can only

give effect by dividing the money between the two societies. I do not think that any authority cited militates against this view.

In *Wilson* v. *Squire* (1) there was a gift to the *London Orphan Society, City Road.* There was a society in the *City Road* called the *Orphan Working School,* and a society at *Clapton* called the *London Orphan Asylum;* and Vice-Chancellor *Knight Bruce* held, that the description of locality prevailed, and the institution in the *City Road* must take the legacy; and the present Lord Chancellor, in *In re Clergy Society* (2), where he followed that case, said: "I think there is sufficient on the face of the will to shew that the testatrix meant to confer a charitable benefit on the clergy of the Church of *England.*" That principle, I think, is entirely applicable to the present case.

In the case of *Simon* v. *Barber* (3) there was nothing to shew what society was intended to take. With regard to *Bernasconi* v. *Atkinson* (4), it has really no application to the present case as regards the question of the admissibility of parol evidence; but it certainly does appear to be a strong decision, because it gives the legacy to a person who did not answer the description either in name or relationship; still, it was the decision of the present Lord Chancellor, and I must assume it to be correct. In *Simon* v. *Barber* there was a gift to the *Guernsey Hospital,* and there were two *Guernsey Hospitals.* The gift was, therefore, ambiguous, and the legacy was divided between them. I think the only other material case was *Bennett* v. *Hayter* (5). In that case it was admitted that no one society could take, and the only question was as to the application of the *cy-près* doctrine. *Loscombe* v. *Winteringham* (6) has no particular application.

On the whole, therefore, I am bound to conclude that there is no one society which, by taking the legacy, can provide for the whole object intended, which can only be attained by dividing the legacy between the two societies. If no arrangement had been suggested, I might have directed it to be divided between them equally; but it has been proposed, on grounds that seem reasonable, to divide

(1) 1 Y. & C. Ch. 654.
(2) 2 K. & J. 615.
(3) 5 Russ. 112.
(4) 10 Hare, 345.
(5) 2 Beav. 81.
(6) 13 Ibid. 87.

17 Jun 28

V.-C. M. 1871 *In re* KILVERT'S TRUSTS.

it in the proportions of seven to five, and I think that will be a proper division. All the costs will be out of the fund.

Solicitors: Messrs. *Merediths, Roberts, & Mills;* Messrs. *Duncan & Murton.*

V.-C. M. 1871 *June* 2.

In re SANDERSON'S PATENTS ASSOCIATION.

Company—Winding-up—Companies Act, 1862, *s.* 79—*Only seven Shareholders and no Debts.*

The Court has jurisdiction to make an order to wind up a company where there are only a few shareholders and no debts.

Re Natal, &c., Company (1) and *In re Sea and River Marine Insurance Company* (2) considered.

2 Ch. D. 114
4 Ch. D. 675.

THIS was a Petition by a shareholder holding 2666 shares in *Sanderson's Patents Association,* which was a limited company under the Act of 1862.

The company was formed by the registration, on the 12th of February, 1868, of a memorandum of association, which stated its object to be the working and licensing of certain patents for improvements in the manufacture of steel and iron.

There were seven shareholders only, all of whom signed the memorandum of association. The capital consisted of £10,000, divided into as many shares of £1 each. Three of the shareholders, holding together 7998 shares, desired a winding-up order, and four shareholders, holding the remaining 2002 shares, opposed the order. The company had never commenced business, and there were no debts, and the shares were all issued as fully paid-up shares.

Mr. *Glasse,* Q.C., and Mr. *Higgins,* for the Petitioner:—

The Court has power, under sect. 79 of the *Companies Act,* 1862, to direct a winding-up where the number of shareholders has fallen below seven. The order, therefore, must be proper wherever there are seven shareholders.

(1) 1 H. & M. 639. (2) Law Rep. 2 Eq. 545.

Mr. *Batten*, for the dissentient shareholders:—

The authorities are express, that where the number of shareholders is small and there are no debts, the Court will not put the expensive machinery of the Winding-up Acts in force, but will leave the parties to the ordinary law of partnership. This was the rule before the Act of 1862: *Ex parte Wise* (1); *Ex parte Inderwick* (2)—and has continued to be so still: *Re Natal, &c., Company* (3); *In re Sea and River Marine Insurance Company* (4). The rule is of obvious convenience, for in a partnership suit the first inquiry is of what the property of the partnership consists, and that is the only important inquiry in a company like the present. If that inquiry were added to the usual order, it might be assented to.

Mr. *Glasse*, in reply:—

Such a direction is wholly unnecessary, and therefore undesirable, since it is the first duty of the official liquidator to make the inquiry under the usual order. It does not appear that in the cases cited the provisions of sect. 79 of the Act were considered at all.

SIR R. MALINS, V.C.:—

If *Re Natal, &c., Company*, which was followed in *In re Sea and River Marine Insurance Company*, was a decision that the Court will never wind up a company which has only seven shareholders, I entirely dissent from that view. But I think the learned Vice-Chancellor did not intend so to decide. I am of opinion that the company is within the Act, and shall make the order to wind it up. There will be no direction for an inquiry as to what the property of the company consists of, because it is wholly unnecessary. It is the first duty of the liquidator to make such an inquiry, and therefore there would be no object in directing it; and I decline to make it, not because I do not wish for such an inquiry, but because I am sure it will be made.

Solicitors: Mr. *T. W. Roffey*; Mr. *E. H. Barlee*.

(1) 1 Drew. 465.
(2) 3 De G. & Sm. 231.
(3) 1 H. & M. 639.
(4) Law Rep. 2 Eq. 545.

V.-C. M.

1871

June 8

In re LONDON AND DEVON BISCUIT COMPANY.

Company—Proceedings after Commencement of Winding-up—Execution "put in force"—Writ in Sheriff's hands, but Possession not taken before Winding-up—25 & 26 Vict. c. 89, *ss.* 87, 163.

A creditor, having obtained judgment in an action against a company, placed the writ of execution in the hands of the sheriff three hours before a Petition was presented for winding up the company, but possession of the property was not taken by the sheriff until three hours after the presentation of the Petition:—

Held, that execution was not "put in force" within the meaning of the 163rd section of the *Companies Act*, 1862, until possession was actually taken; and that as it appeared that the debt of the creditor was already secured by a guarantee of the directors, and the object of the winding-up was to secure a *bonâ fide* distribution equally among all the creditors, there were no grounds for the exercise of the discretion given to the Court by the 87th section of the Act, and a motion to stay the proceedings under the writ of execution was acceded to.

THIS was a motion to stay further proceedings under a writ of execution levied by *Mary Ann Thorne* against the *London and Devon Biscuit Company, Limited.*

Miss *Thorne* had lent money to the company upon the security of certain promissory notes or bills of exchange given her by the company, and upon a guarantee entered into by five out of the six directors.

The money so advanced to the company being unpaid, and the bills being dishonoured, she brought an action against the company on the 18th of May, 1871. Judgment was obtained in the action on the 31st of May. The writ of execution was taken out the same day, and was sent by that night's post to the under-sheriff of *Devon*, at *Exeter*, to whom it was admitted on both sides to have been delivered before ten o'clock on the 1st of June. The writ was then placed by the under-sheriff in the hands of his agent, who left *Exeter* by the first train for *Barnstaple*, where the property was situate, and possession was taken at about four o'clock on the same day (the 1st of June). At one o'clock on that day the Petition for winding-up was presented by a creditor, consequently the writ of execution was in the hands of the sheriff three

hours before the winding-up process commenced, but possession was not actually taken until three hours after the commencement of the winding-up.

Mr. *Glasse*, Q.C., and Mr. *Ince*, in support of the motion:—

This case comes strictly within the 163rd section of the Act 25 & 26 Vict. c. 89, which enacts that, where a company is being wound up, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents. The writ was, no doubt, in the hands of the sheriff before the winding-up, since it has been held that the winding-up is to date from the presentation of the Petition, but it was not "put in force," as the Act requires, till three hours after the presentation of the Petition. By the words "distress or execution" being coupled together, it is shewn clearly that as putting in a distress must mean actually going into possession of the property, and not the mere signing of a distress warrant, so putting in force an execution must mean taking possession: *Lucas* v. *Nickells* (1). In *In re Great Ship Company* (2) the creditor took possession before the winding-up, and the Lords Justices, reversing the decision of the Master of the Rolls, refused to restrain him from reaping the benefit of his diligence. The Master of the Rolls acted upon the principle that the object of the Act was to secure equal distribution amongst all creditors; but in this case an equal distribution will be secured by restraining the creditor from selling. Miss *Thorne* is amply secured by the directors, and they will reap the benefit of her being allowed a priority.

In the case of *In re Bastow & Co.* (3), your Honour refused to stay proceedings under an execution issued after the winding-up had commenced, but this was under very peculiar circumstances, and the Court would not be desirous of acting on that decision, except in a case equally strong.

Mr. *Cotton*, Q.C., and Mr. *Locock Webb*, *contrà*:—

From the moment the writ was placed in the hands of the sheriff

(1) 10 Bing. 157. (2) 10 Jur. (N.S.) 3. 4 De G.J.S. 63.
(3) Law Rep. 4 Eq. 681.

V.-C. M. 1871 *In re* London and Devon Biscuit Co.

the goods of the company were bound under the 16th section of the *Statute of Frauds*, and this comes within the meaning of the words "put in force" used in the 163rd section. The execution was, in fact, put in force, though possession was not actually taken. This is a much stronger case than that of *In re Bastow & Co.* (1), because there the winding-up process was commenced on the 27th of June, and execution was not levied till the 2nd of July, when the sheriff entered upon the property; whereas here possession was taken only three hours after the winding-up, and the writ was in the hands of the sheriff before the winding-up. In that case your Honour held, in conformity with the case of *In re London Cotton Company* (2), that the Court had a discretion under the 87th section of the Act of 1862, whether it would allow the proceedings to be continued, and if ever there was a case for the exercise of the Court's discretion it is this, where the goods were bound before the winding-up petition was presented. We bring it to this, that there was a lien on the goods before the winding-up commenced. This case falls within *Woodland* v. *Fuller* (3), where the Defendant, having obtained a judgment against *T.*, lodged a *fi. fa.* with the sheriff under 3 & 4 Will. 4, c. 42, s. 20, and the sheriff immediately issued a warrant to an officer. Afterwards, on the same day, a vesting order was made under the Act 1 & 2 Vict. c. 110, s. 37, by the Insolvent Debtor's Court, transferring the estate of *T.* The assignee under this order took possession of *P.'s* property, and then the sheriff seized it, and it was held that the seizure was proper.

Mr. *Glasse*, in reply.

Sir R. Malins, V.C.:—

This is a motion raising a point of very considerable importance under the *Companies Act*, 1862, and which I am surprised to find is so much open as it is. The motion is to stay further proceedings under the execution of a writ issued by *Mary Ann Thorne* against the company sought to be wound up, for no order to wind up has yet been made. Miss *Thorne* had lent money to the company in

(1) Law Rep. 4 Eq. 681. (2) Law Rep. 2 Eq. 53. 12 Eq 313.
(3) 11 A. & E. 859.

May, 1870. Being unpaid, she brought an action against the company on the 18th of May, 1871. Having promissory notes or bills of exchange, she took out a summons, the proceedings on which are very rapid, and she obtained judgment on the 31st of May. It appears that the writ of execution was forwarded by post the same evening to the under-sheriff of *Devon*, at *Exeter*, the property being at *Barnstaple*, and would have been delivered the next morning in the ordinary course of post, which seems not to be later than ten o'clock. Therefore it may be taken that the writ was in the hands of the sheriff at ten o'clock on the 1st of June. At one o'clock of that day, being three hours afterwards, the Petition to wind up was presented by a creditor, that is, the bankers of the company, so that the winding-up process commenced three hours after the writ was in the hands of the sheriff. Now, the ordinary course of the Court is, when the process of winding-up has commenced, to stay all proceedings at law; and in the present case, if Miss *Thorne* had simply been proceeding with her action, and had obtained judgment without issuing execution, it is quite clear that the Court would have stayed all proceedings in the action, the object of the Act being to secure as far as possible equality of payment amongst all creditors. It is thoroughly settled that, on an order being ultimately made, a company is to be regarded as being wound up from the time of the presentation of the Petition; and therefore, assuming that the order will be made, it follows that at one o'clock on the 1st of June this company must be treated as being "wound up." Then it appears that the under-sheriff at *Exeter*, having this writ forwarded to him, placed it in the hands of his agent, who levied execution under it at four o'clock on the same day, which was three hours after the winding-up had commenced. Now, the 163rd section is very positive in its enactment. It is this: "Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." If the case had stood upon that section alone, I am clearly of opinion that the words "put in force" mean when execution is actually levied—not when the writ is put into the hands of the sheriff, but

V.-C. M. 1871 *In re* London and Devon Biscuit Co.

when the sheriff, by virtue of the writ, enters into possession, or, to use the common expression, levies execution. Then, and not till then, in my opinion, within the meaning of this section, the words "put in force" are complied with, and that was not until four o'clock. Therefore, if it depended on the 163rd section only, I think it clear that the execution which was put in force three hours after the commencement of the winding-up was too late, and was absolutely void to all intents whatever.

But it has been settled that the 163rd section must be read in connection with the 87th section—it is to be read as one enactment. The 87th section enacts that, "Where an order has been made for winding up a company under this Act no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose." That is, according to the literal expression, where an order has been made for winding up the company.

At present no order has been made for winding up the company, because this Petition will not come before me for hearing till the 23rd instant, for which day it has been answered by the Lord Chancellor. Therefore, strictly, it is not within the 87th section, because an order has not been made; but, assuming that the 87th and the 163rd sections are to be taken together, is this a case in which the discretion of the Court should be exercised in favour of the execution creditor. It has been settled by several authorities that, where the judgment creditor has actually levied an execution before the commencement of the winding-up, the Court will not disturb it. That was decided by the Lords Justices in *In re Great Ship Company* (1), followed by the Lord Chancellor, when Vice-Chancellor, in *In re London Cotton Company* (2).

In the *Great Ship* case, the execution creditor had actually levied, and was in possession when the commencement of the winding-up took place. In the *Cotton Company's* case, he would have been in possession (for the sheriff had issued the writ) but for the fact that the judgment creditor, or the agent representing him, had the door shut in his face, and upon that circumstance only he was prevented being in possession. Vice-Chancellor *Wood*, under those circumstances, considered he was in the same position pre-

(1) 10 Jur. (N.S.) 3. 4 De G. J. & S. 63 (2) Law Rep. 2 Eq. 53. 12 Jur. N.S. 313

cisely as if he had actually entered, and treated him as a judgment creditor having actually levied his execution. Those cases therefore settle that the Court will not disturb him when execution has actually been levied. That was followed by myself in the case of the *Plas-yn-Mhowys Coal Company* (1), where the execution creditor was in possession. In the present case the creditor was not in actual possession, and the execution had not been levied.

The only case in which this priority has been given to the creditor, where there has not been an actual execution, is in the case before me of *In re Bastow & Co.* (2). In that case the process of winding-up, upon a Petition by the company itself, commenced on the 27th of June. On the 18th a writ was issued, judgment was signed on the 1st of July, and an execution levied on the 2nd; and the same day the sheriff entered upon the ironworks belonging to the company which was being wound up. Therefore, in that case, the levy was after the commencement of the winding-up; but under the particular circumstances of the case, armed as I was by the decision of the Lords Justices (for it is their construction, that the 87th and 163rd sections should be read together), with the power of exercising the discretion reposed in the Court by the 87th section, and it being a Petition to wind up by the company itself, where I considered the company had not acted fairly towards the creditor in omitting to give him such notice as he ought to have received, I thought justice required that I should allow the creditor to have the same advantage as if he had actually levied before the commencement, instead of after the commencement of the winding-up. That view of the case will be found expressed by me in the case of *In re Bastow.* That decision was not appealed from, and it has therefore stood as the rule of the Court since.

The question I have now to decide is, whether the present case falls within the principle of *In re Bastow.* It does seem very hard upon a creditor that a right should be intercepted by three hours. If Miss *Thorne* had levied at any time before one o'clock on the 1st of June she would have been in possession, and entitled to the benefit of the possession, according to the decision in the *Great Ship Case* and the other cases I have referred to. What I have to look at is, first, that the 163rd section, having in view, I think,

(1) Law Rep. 4 Eq. 689. (2) Law Rep. 4 Eq. 681.

V.-C. M. 1871 *In re* London and Devon Biscuit Co.

an equal distribution among all creditors, positively enacts that any execution put in force after the winding-up shall be void. I am clearly of opinion that the words "put in force" can only mean actually levied; signing a distress warrant for a person to enter and distrain for rent would not amount to distress without an actual levying of the distress, in order to give any advantage, before the winding-up, and if after, it would be void.

Then the object being, as I think, to secure an equal distribution among all creditors, inasmuch as this creditor was not in possession by the sheriff when the commencement of the winding-up took place, and as the Petition to wind up is presented by a *bonâ fide* and actual creditor for the *bonâ fide* purpose of obtaining an order which would distribute all the assets equally among the creditors, I think it is taken out of the peculiarity of *In re Bastow*, and there are not in favour of this creditor those circumstances which occurred in *In re Bastow* to allow the levy to go.

The case, then, being strictly within the positive enactment of the 163rd section, I am of opinion that there are no special circumstances in favour of this creditor, which call upon me to exercise the discretion with which I am armed under the 87th section. Indeed, there is nothing in favour of this creditor. If she has a security, of course it will be available to her. If she has not some security, she has lent her money upon the guarantee of the directors; and so far from there being any peculiar equity in her favour, I am disposed, notwithstanding all I have heard in resistance to this application on her part, to consider that the opposition to this motion is rather the opposition of the directors than of herself, because I assume that she was satisfied with the solvency of the directors who gave her the guarantee. No suggestion has been made that they are otherwise than solvent, and I must treat them as such till the contrary is shewn. Therefore this lady, Miss *Thorne*, is amply secured against any loss which she may sustain by the guarantee given by the directors. I rather look upon the case as one in which the directors are endeavouring to obtain an advantage in their own favour as against creditors; and that being, in my opinion, the real object in view, I think it is taken out of every case under the 87th section, where the Court has exercised its discretion in favour of creditors. Miss *Thorne* is amply secured

in other ways, and these proceedings are taken only for the benefit of the directors (for I must so treat it), who, in my opinion, ought to stand behind all the other creditors. I had a similar case before me about a year ago, where an application of the same kind was made; and in that case I regarded it as an application by the directors, for the directors had given a guarantee to a creditor, and it was a proceeding by this creditor to have this advantage. I refused it on those grounds.

Therefore, taking the object of the Act of Parliament into consideration, I am of opinion that the case is within the 163rd section, and that I am not called upon to exercise any discretion in favour of the creditor under the 87th section. Miss *Thorne* has been put to some expense in obtaining the judgment, and the amount of her debt will be the debt and the costs of obtaining judgment.

I think it is not unimportant to observe that, in the *Bankruptcy Act*, although the enactments are different, there is the same object in view as in the Winding-up Acts, namely, the distribution of the assets among all creditors. If this lady had done precisely the same act against an individual as against the company, namely, issued execution, but not actually levied, she would by the 133rd section of the *Bankruptcy Act* have stood only as a general creditor. So, in my opinion, unless there are some special circumstances having the same effect as in *In re Bastow*, there must be an actual levy to authorize the Court to say that the execution shall go on after the commencement of the winding-up.

Therefore the motion must be acceded to, and the further proceedings under the execution must be stayed.

Solicitors: Messrs. *Clarke, Woodcock, & Ryland.*

V.-C. M.
1871
April 22.

EDMONDSON *v.* SHARP.
DEAN *v.* SHARP.

Practice—Revivor—Death of sole Plaintiff—Interest surviving to a Defendant.

An administration suit was instituted by a trustee of a will against the residuary devisees and legatees, one of whom was a co-trustee with the Plaintiff. The Plaintiff died after decree, and the suit was revived by an original bill against the same parties by a trustee appointed in the place of the original Plaintiff. The new Plaintiff having died :—

Held, that the suit might be revived by the common order at the instance of one of the Defendants, who was a residuary devisee and legatee, but was not and did not intend to become a trustee.

WILLIAM SHARP, who died on the 13th of November, 1861, by his will, and a codicil thereto, appointed *John Edmondson* and his son *William Sharp*, and his daughter *Jane Taylor Sharp*, executors and executrix, and gave them his residuary real and personal estate upon trusts for his four sons, *William Sharp*, *Henry Parkinson Sharp*, *James Atkinson Sharp*, and *Edward Sharp*. Probate was taken out by *John Edmondson* and *William Sharp*, *Jane Taylor Sharp* having renounced.

On the 8th of May, 1867, *John Edmondson* filed a bill for administration against the four sons. A decree was made on the 30th of July, 1867, and on the 2nd of May, 1868, certain additional inquiries were taken. But before the suit came on for further consideration, on the 5th of August, 1868, the Plaintiff died, and the suit in consequence abated.

William Henry Dean was appointed a trustee in the place of *John Edmondson* jointly with the Defendant *William Sharp*, who was the surviving trustee, and on the 9th of December, 1868, he filed an original bill for the purpose of reviving the suit.

W. H. Dean was killed in a railway accident on the 15th of April, 1871, and the suit, in consequence, again abated, and *William Sharp* became the surviving trustee.

The suit being now almost ready to be heard on further consideration, the present application was made for an order of revivor at the instance of the Defendant *Henry Parkinson Sharp*. He was not, and was not intended to be, appointed a trustee.

V.-C. M.
1871
EDMONDSON v. SHARP.
DEAN v. SHARP.

Mr. *Kekewich*, in support of the application:—

There has been no transmission of interest or liability to any person not a party to the suit, and no additional person is required to be brought before the Court. Under such circumstances, the common order may be made: *Hobson* v. *Shearwood* (1).

SIR R. MALINS, V.C.:—

I think there is sufficient authority for making the order. It may, therefore, be allowed.

Solicitors: Messrs. *W. & H. P. Sharp.*

In re HALLIDAY'S SETTLED ESTATES.

V.-C. M.
1871
July 7.

Practice—Leases and Sales of Settled Estates Act (19 & 20 *Vict. c.* 120), *s.* 37—*Married Woman Petitioner—Separate Examination of Petitioner dispensed with.*

Where, in a Petition under the *Leases and Sales of Settled Estates Act*, a married woman is a Petitioner, the Court may, upon reasonable ground, dispense with the examination required by sect. 37 of the Act; and will do so where it is satisfied that the order asked for is beneficial to all parties, and that the delay necessary for taking the examination would be prejudicial.

WILLIAM HALLIDAY, by his will, dated the 2nd of December, 1854, gave his real and personal estate to trustees upon trust to sell the real estate, and to get in the personal estate, and to stand possessed of the moneys to arise from the sale and conversion (subject to certain specific bequests), upon trusts for his four daughters and their children; and he empowered his trustees to postpone the sale and conversion of the real estate, or any part thereof, for such time as to them should seem expedient, and to grant leases for terms not exceeding fourteen years in possession, and generally to manage and improve the same at their discretion; but the will contained no more extensive power of leasing.

The testator died on the 25th of May, 1860. Part of his property consisted of an estate in the county of *York*, containing valuable minerals. The trustees had exercised their discretion to

(1) 15 W. R. 887. WN(1867)121.

V.-C. M. 1871 — *In re* Halliday's Settled Estates.

postpone the sale of this estate, and an opportunity had arisen for leasing for a long term of years a bed of coal under it.

Of the testator's daughters, three were dead, having left children, who were now living. A Petition was accordingly now presented by the surviving trustees of the will, the surviving daughter, and several of the children of the daughters who were dead, to obtain the sanction of the Court to the proposed lease, under the *Leases and Sales of Settled Estates Act.* One of the Petitioners, *Flora Marina Scott,* a daughter of one of the testator's deceased daughters, was a married woman, resident in *New Zealand,* and considerable time would of necessity elapse in taking her examination.

Mr. *Cole,* Q.C., and Mr. *Nalder,* for the Petitioners, asked that, in order to prevent delay, the separate examination of Mrs. *Scott,* required by sect. 37 of the Act, where a married woman is Petitioner, might be dispensed with. They referred to *Re Lord De Tabley's Settled Estates* (1), in which the same course had been taken in a case where the interests of the married woman were remote.

Mr. *Streeten,* for the Respondents, who were the remaining beneficiaries under the will.

Sir R. Malins, V.C.:—

The lease in the present case is so clearly for the benefit of all the parties, that I will follow the precedent of the case cited. The order will accordingly recite the opinion of the Court, that the lease is for the benefit of all parties; and the separate examination of the Petitioner *Flora Marina Scott* will be dispensed with.

Solicitors: Messrs. *Flower & Nussey.*

(1) 11 W. R. 936.

SINNETT *v.* HERBERT.

V.-C. B.
1871
June 23.

Will—Charity—Endowment of future Church—9 Geo. 2, c. 36.

Bequest of personal estate, upon trust, to be applied in aid of erecting or of endowing an additional church at *A*.

Neither at the date of the will, nor of the testatrix's death, was any such additional church in course of erection or in immediate contemplation:—

Held, upon the construction of the will, that the bequest was limited to a church in existence or in course of erection at the time of the testatrix's death, and consequently did not take effect.

Varied by L.C. 1 R.J. Ch. 232.

FURTHER CONSIDERATION.

Mary Morice, spinster, by her will, dated the 7th of April, 1865, after bequeathing certain annuities, charged all and singular her real estates of which she should die possessed with the said annuities and the payment thereof respectively, and gave power to the annuitants respectively to recover such annuities when in arrear, and all costs and charges of such recovery by distress and sale in like manner as rack-rents are recoverable by law.

Subject to the said several annuities and the payment thereof respectively, testatrix gave and devised all and singular the real estates of which she should die possessed unto her nephew the Rev. *James Hughes* in fee. After certain legacies, the testatrix bequeathed to *Frederic Rowland Roberts* and *John Sinnett*, whom she appointed as her executors, £3000, "to be by them applied in aid of an endowment for the Welsh church now in course of erection at *Aberystwith*. And as for and concerning the residue of my personal estate and effects, subject to the payment of my debts, funeral and testamentary expenses, and the legacies hereinbefore by me bequeathed, I bequeath the same to the said *F. R. Roberts* and *J. Sinnett* upon trust, to be by them applied in aid of erecting or of endowing an additional church at *Aberystwith* aforesaid."

The testatrix died on the 10th of December, 1866.

A suit having been instituted for the administration of the testatrix's estate, certain inquiries were directed by the decree, dated the 7th of May, 1869, of which the following were material:—

9. Whether a sum of £358 13*s.* 8*d.*, standing in the name of

V.-C. B. 1871 SINNETT v. HERBERT.

the testatrix in the savings bank at *Aberystwith* to "The Account of Miss *Morice* of *Carrog*, as trustee for charitable purposes," was part of the personal estate of the testatrix, and whether the same was subject to any and, if any, what trusts.

10. Whether there was any church answering the description in the will of "an additional church at *Aberystwith*" being erected, or being about to be erected, at the time of the death of the testatrix.

By his certificate the Chief Clerk found that the £358 13*s.* 8*d.* standing in the savings bank was part of the personal estate of the testatrix, and that no evidence had been produced to shew that such sum was subject to any particular trust. He also found that there was not any church answering the description in the will of an additional church at *Aberystwith* being erected, or being about to be erected, at the time of the testatrix's death.

It appeared from the evidence of the vicar of *Aberystwith*, upon the 10th inquiry, that at the date of the will there was at *Aberystwith* the church of *St. Michael*, which was constituted by Order in Council in 1861 the district church, and that there was also a church then in course of erection as a chapel-of-ease to *St. Michael's*, and known as the "Welsh church," from its being intended to hold the services therein in Welsh. This church was opened for public worship in August, 1867. Beyond these two churches there was no other church at *Aberystwith*, and there was not any church being erected or being about to be erected there, although, as the vicar stated, he had often talked with the testatrix respecting the endowment of the Welsh church, and the necessity, during the summer season, of additional church accommodation either by enlarging *St. Michael's*, or by building an additional church, or by having an additional service for visitors at the Welsh church.

The case now came on upon further consideration.

The main question argued was, whether the gift of the residue was valid, having regard to the statute 9 Geo. 2, c. 36.

Two minor questions were raised: 1. Whether the personal estate was exonerated from the annuities. 2. Whether the £358 13*s.* 8*d.* in the savings bank was dedicated to charity or formed part of testatrix's personal estate.

Mr. *Amphlett*, Q.C., and Mr. *Reginald Hughes*, for the Plaintiffs, upon the question whether the personal estate was exonerated from the annuities, cited *Ion* v. *Ashton* (1).

Mr. *Bristowe*, Q.C., and Mr. *Fellows*, for some of the next of kin of the testatrix:—

The gift of this residue is void under the *Statute of Mortmain* (9 Geo. 2, c. 36), as there was no additional church in course of erection at *Aberystwith*, or even in contemplation, at the death of the testatrix, and the bequest cannot possibly be carried into effect without bringing into mortmain fresh land as a site for a new church: *In re Watmough's Trusts* (2). In *Attorney-General* v. *Hull* (3), a bequest towards establishing a school, and in *Dunn* v. *Bownas* (4), a bequest for establishing a hospital, were held void. *Philpott* v. *President of St. George's Hospital* (5) is not inconsistent with the older cases, as in that case the testator expressly prohibited the application of the money in the purchase of land. The gift is therefore bad under the *Statute of Mortmain*, and if it is attempted to obviate the objection of bringing fresh land into mortmain by waiting until an additional church has been erected, which can be then endowed, the gift will be bad under the rule against perpetuities. The gift cannot be applied *cy-près*, as the testatrix has pointed out a particular purpose which cannot be enforced, and has not made any disposition or declared any trust in favour of charity generally: *Cherry* v. *Mott* (6); *Clark* v. *Taylor* (7); *New* v. *Bonaker* (8).

Mr. *Kay*, Q.C., and Mr. *Speed*, for others of the next of kin in the same interest:—

The word "endow" means giving a benefit to some existing thing; it supposes something to exist either at the time when the gift was made or when the endowment is to take place: *Edwards* v. *Hall* (9).

There was no additional church in existence or in contemplation at the death of the testatrix; and the gift is either bad under the

(1) 28 Beav. 379.
(2) Law Rep. 8 Eq. 272.
(3) 9 Hare, 647.
(4) 1 K. & J. 596.
(5) 6 H. L. C. 338.
(6) 1 My. & Cr. 123.
(7) 1 Drew. 642.
(8) Law Rep. 4 Eq. 655.
(9) 6 D. M. & G. 74, 83; 11 Hare, 1.

V.-C. B. 1871 SINNETT v. HERBERT.

Statute of Mortmain, as contemplating the bringing fresh land into mortmain, or under the rule as to perpetuities if the operation of the endowment is suspended indefinitely until an additional church has been built.

[They also cited *Smith* v. *Oliver* (1).]

Mr. *Hemming*, for the Attorney-General:—

The gift of the residue is not void under the statute. Before *Trye* v. *Corporation of Gloucester* (2) was overruled by *Philpott* v. *President of St. George's Hospital* (3), there was a notion that any gift which was an inducement to persons to bring fresh land into mortmain was bad under the statute. Upon the authorities it is clear that a direction to "endow" does not necessarily imply the purchase of land; and when, as here, trustees have an option between a legal and an illegal mode of carrying out a trust (endowment or erection), they may elect, and are bound to elect, the legal mode, and thus sustain the gift. It has been contended that a gift for the endowment of future churches not in existence is bad, as inducing the bringing of fresh land into mortmain, but that is answered by *Edwards* v. *Hall* (4), where Vice-Chancellor *Wood* (5) says: "Here the application is to be for purposes perfectly legitimate — an endowment of churches, of which there are plenty, which require aid in their endowment. There is a possible application of it, no doubt, to future churches; but if even the bequest is to be looked at with reference to its application to future churches, is that to be held to be such an inducement to bring land into mortmain as to be an evasion of the statute? That, I think, would be too strong." When *Edwards* v. *Hall* was decided, *Trye* v. *Corporation of Gloucester* was not overruled, and it is clear that the only difficulty felt by Vice-Chancellor *Wood* was that arising from this case, though he considered that, even if sound in law, it might be distinguished. All such difficulty is removed by *Philpott* v. *President of St. George's Hospital.* With respect to the form of the 10th inquiry, it ought to be continued in a form not limited to the death of the testatrix, as it is quite lawful for the trustees to go about to landowners and

(1) 11 Beav. 481.
(2) 14 Ibid. 173.
(3) 6 H. L. C. 338.
(4) 11 Hare, 1.
(5) 11 Hare, 20.

see what they will do towards building a church which may be afterwards endowed with the trust fund, and they will be able to do this when the Court has decided that in such case the endowment will be available. In analogous cases, what the Court has done has been to carry the fund to a contingent account, with an inquiry not limited to the death.

The money in the savings bank must be taken as dedicated to charity generally, in the same manner as if the testatrix had signed a statement that the money was in her hands as a fund of which she was a trustee for charitable purposes.

Mr. *Bristowe*, in reply.

SIR JAMES BACON, V.C.:—

I accept very readily the definition of the word "endow." It is of a personal signification and of a personal character—that is, applied to some particular circumstances—and it means "to bestow upon;" but there must be something in existence for such a gift to operate upon—some existing church which may be endowed. I cannot impute to this testatrix any such unreasonable intention as that her executors should hold for all time, for all succession, the residue of her estate, in order to bestow it when there should be something or some persons on whom or on which to bestow it. To hold it thus in suspense would be entirely out of the question. Then, as I read the decree, I find that it must have been in the contemplation of the Court, when it was made, requisite to ascertain and understand whether, at the time when the testatrix made her will in 1865, and when she died, nearly two years later, there was any additional church in existence or in course of construction at *Aberystwith* on which the bounty which she then expressed her intention of dealing with should be bestowed. Now, not only does the inquiry, as far as it has gone, confined to the death of the testatrix, shew that there was no additional church then, but it has not been suggested to me that anything has happened since, or that any change has taken place in the opinion of the population of *Aberystwith* as to the necessity for an additional church, or that there is any prospect whatever that an additional church will be built there. It would be unreasonable, therefore, I think, to suspend the operation of this will, and I think it must

V.-C. B. 1871 SINNETT v. HERBERT.

be read as if the testatrix had said, "At the moment of my death, when I dispose of the whole of my property, pay the legacies, and do as I have told you; and as to all that remains, bestow it at once upon an additional church." If there is no additional church, that provision of her will will have no effect. I quite agree that the decision of the House of Lords in *Philpott* v. *President of St. George's Hospital* (1) has got rid of the notion that any gift, however meritorious, which might be supposed to have a tendency to bring fresh land into mortmain, is void under the statute. I leave that out of consideration altogether. I proceed upon the very words of the will, and the intention of the testatrix to be collected from those words; and the legal signification of the words she has used is, that the residue shall be bestowed upon an additional church, if an additional church be then in existence or in course of erection, no matter which. Inasmuch as there was no church when she made her will, and no church at the time of her death, and no suggestion that there is any additional church now needed and about to be built at *Aberystwith*, the gift of the residue for that charitable purpose fails altogether. I also think that the *cy-près* doctrine cannot apply, as there is an absence in this will of any intention to give in general charity.

Upon the remaining questions in the case, the £358 13*s.* 8*d.* in the savings bank must be treated as part of the personal estate of the testatrix. The most that could be said of it was, that she set apart this sum and put it into the savings bank, reserving to herself the right of disposing of it for such charitable purposes as she might think fit, owing no obligation to anybody, having made no communication to any *cestui que trust*, having raised no expectations, but reserving to herself full power to give it or not, as she thought fit. Her right of property in the fund was never interfered with in the slightest degree, and having died without having carried any intentions she might have into effect, it is impossible to distinguish that money from any other money that was hers. As to the annuities being charged upon the real estate, I consider that *Ion* v. *Ashton* (2) has settled the law in that respect.

Solicitors: Mr. *E. Balden*, agent for Mr. *F. R. Roberts, Aberystwith*; Messrs. *Jones, Blaxland, & Son*; Messrs. *Raven & Bradley*.

(1) 6 H. L. C. 338. (2) 28 Beav. 379.

Ex parte SHERIFF OF MIDDLESEX.
In re ENGLAND.

C. J. B.
1871
April 24;
May 1.

Bankruptcy Act, 1869, ss. 13, 65, 72, 126—*Jurisdiction—Composition with Creditors—Injunction.*

On the 9th of November, 1870, judgment was obtained in an action against *E.*, and on the 15th of November execution was levied by the sheriff under a writ of *fi. fa.* On the 17th of November a petition for liquidation by arrangement with his creditors, under sect. 125 of the *Bankruptcy Act*, 1869, was presented by *E.*, and on the 19th an injunction restraining further proceedings in the execution was granted. On the 20th of January, 1871, the creditors held a statutory meeting, and passed a resolution, which was afterwards duly confirmed and registered, to accept a composition. After this *E.* brought an action for trespass against the sheriff for retaining possession of the goods seized, and at the same time the execution creditor ruled the sheriff to return the writ of *fi. fa.* which had been directed to him. Under these circumstances, the sheriff applied to the Court to restrain the proceedings against him and for protection and directions:—

Held, that the Court of Bankruptcy had jurisdiction; that the execution was good against the estate of *E.*, notwithstanding the resolution for composition; and order made restraining the action which had been brought by *E.*

IN this case an application was made to the Court by the Sheriff of *Middlesex*, the substance of which was that an action which had been brought against him by *Philip Newberry England*, the insolvent debtor, upon whose Petition the proceedings in this matter had been instituted, might be stayed. The facts, so far as it is necessary to state them, were as follows:—

On the 9th of November, 1870, judgment was obtained by *James Saul* in an action brought by him against *P. N. England*, and on the 15th of the same month execution was levied by the sheriff against the goods of *England* under a writ of *fi. fa.* On the 17th of the same month a Petition under the 125th section, in the form prescribed by the Rules, and intituled in the *Bankruptcy Act*, 1869, was presented by *England*. A receiver was appointed upon the application of the debtor, and upon the like application an injunction was, on the 19th of December, obtained restraining the sheriff from any further proceedings under the execution, and that injunction was continued upon several occasions until after the 26th

C. J. B.
1871
Ex parte SHERIFF OF MIDDLESEX.
In re ENGLAND.

of March, 1871. Various proceedings were had under the Petition. On the 20th of January, 1871, a meeting of the creditors of *England* was held according to the statute and the Rules in bankruptcy, at which it was resolved, by a majority of the creditors present, that they would accept a composition offered to them by the debtor of 8*s.* in the pound on their respective debts, payable by four quarterly instalments from the date of the registration of the resolutions. At a second meeting of creditors, held in like manner, on the 2nd of February last, the resolutions of the first meeting were duly confirmed, and on the 26th of March last the resolutions were duly registered.

Upon this being accomplished, the debtor caused a notice to be served upon the sheriff, intimating to him that the resolutions had been duly registered, and requiring him therefore to withdraw from the possession of the goods which he had taken, and then held under the writ. The sheriff thereupon applied to the attorney of Mr. *Saul,* the Plaintiff in the action in which the writ had issued, and also to the attorney of the petitioning debtor, for the purpose of obtaining from them such directions as would enable him properly to discharge his duty as an officer of the law. The Petitioner's attorney insisted that he should relinquish possession. The attorney of the Plaintiff in the action insisted that he should proceed to execute the writ. And they followed up their successive demands; for, on the 13th of March, 1871, the petitioning debtor served the sheriff with a writ of summons issuing out of the Court of Exchequer, for a trespass in retaining possession of the goods which the debtor alleged to be his, and on the same 13th of March the Plaintiff in the action ruled the sheriff to return the writ of *fi. fa.* which had been directed to him. Under these circumstances the sheriff applied to the Court to restrain the several proceedings against him, to decide upon the rights and priorities of the parties, and for directions as to retaining or withdrawing from the goods in his possession.

Mr. *Reed,* for the Sheriff of *Middlesex*:—

The jurisdiction of the Court to entertain the application is clear from sects. 65 and 72 of the *Bankruptcy Act,* 1869. The *Interpleader Act* is inapplicable, and the sheriff can get no pro-

tection under that. The petition for liquidation is an act of bankruptcy: *In re Bissel* (1); and whether it terminates in liquidation or in composition, the Court has control of the debtor's estate. From Rule 266 of the Bankruptcy Rules, 1870, it is clear that, in the case of a composition, the property remains under the supervision of the Court during the progress of the composition, and up to the time when the whole of it is paid. The Court of Bankruptcy is seised of the whole matter, just as the Court of Chancery is seised of a suit. Here there is a question of priority, which it is clearly the duty of the Court to determine under sect. 72.

Mr. *De Gex*, Q.C., for the execution creditor.

Mr. *Roxburgh*, Q.C., and Mr. *Doria*, for the debtor:—

The Court of Bankruptcy has no jurisdiction in this matter so far as the sheriff is concerned, for he is no party to the proceedings.

Proceedings under the 125th and 126th sections of the *Bankruptcy Act* are not exactly analogous to proceedings in bankruptcy proper. Sect. 126 expressly enacts that a composition may be accepted without any proceedings in bankruptcy, and therefore this is not a case of bankruptcy within the meaning of the 72nd section. The Court has no power to deal with the debtor's property during the composition; it only has power to enforce the composition. There is no power under sect. 13 to grant the injunction applied for, because that section relates only to injunctions against the debtor or his estate, and not against their persons. This is not a question of priority—it is a question of property between the debtor and the sheriff.

May 1. SIR JAMES BACON, C.J., after stating the facts, continued:—

The sheriff being exposed to this cross-fire from the two parties by whom he was at the same time attacked, being unable to make a satisfactory return to the rule by reason of the successive injunctions, in obedience to which he had been prevented from pro-

(1) Law Rep. 11 Eq. 604.

C. J. B. 1871

Ex parte SHERIFF OF MIDDLESEX. *In re* ENGLAND.

ceeding to execute the writ, and having no certain or satisfactory means of defending the action brought by the petitioning debtor, and being under no obligation to take upon himself the defence of that action, applies naturally and reasonably to this Court, inasmuch as it is only in consequence of his obedience to the order and injunction of this Court that he has incurred the danger in which he is placed. And, indeed, there appears to be no other course for the sheriff to pursue, since it is clear that there can be no proceedings by way of interpleader in which the rights of the parties claiming could be tried; and, even if there were, the sheriff may well ask this Court to exercise its jurisdiction in a matter which has arisen solely out of the proceedings in this Court.

The sole question, therefore, appears to be, whether this Court possesses the jurisdiction which is thus appealed to. The execution creditor has been heard, and insists that he is entitled to exercise his common law rights under his execution, inasmuch as the injunction by which he was restrained is no longer of any force, and the purpose for which that injunction was alone granted, viz., the protection of the debtor's goods, until it should be ascertained whether they were distributable among his creditors, has ceased to exist. The debtor, on the other hand, contends that the composition which has been accepted by a majority of his creditors is binding upon the execution creditor, and that he is bound to relinquish the property which he had seized. In support of this latter contention, it has been argued that this Court, which it is admitted has jurisdiction in all matters of bankruptcy, including the subject of liquidation by arrangement, has no further power over the debtor or his estate when once a resolution has been come to for accepting a composition, except only for the purpose of enforcing the composition, and this because, by the 126th section, it is enacted that "the creditors may, without any proceedings in bankruptcy," pass such a resolution as is there mentioned. I am, however, of opinion that this contention cannot be sustained even by the most literal construction of the words of the statute, while it would be wholly opposed not only to the general scope and operation of the statute, but to the most plain principles of reason and justice. For it must be observed that the statute relates wholly to bankruptcy, in all its branches and in all

senses. The 126th section is a part of those comprehensive provisions which include the general law relating to insolvent debtors and their creditors, but the rules which relate equally to proceedings for liquidation by arrangement or composition require that the proceedings by the debtor shall be instituted by a Petition which is intituled "in bankruptcy," and until after the meetings have been held, and the resolutions passed, it cannot be ascertained what form the future proceedings shall assume, but it is certain that, until the resolutions shall have been passed and registered, the proceedings are "in bankruptcy." It is because they are so, and because they are therefore subject to the jurisdiction conferred by sects. 65 and 72, as well as other sections, that the Court is enabled to restrain (as in this case it did restrain) the execution by which a single creditor may seek to possess himself of a part of that insolvent estate, which the law declares and intends shall be distributed equally among all the creditors. It is for this reason and with this view that the Court is empowered "to decide all questions, whether of law or fact, arising in any case of bankruptcy coming within the cognisance of the Court, or which the Court may deem it expedient to decide, for the purpose of doing complete justice."

That the question which has here arisen is one arising in a case of bankruptcy, I think, cannot be doubted, having regard to the provisions of the statute, and to the very form and terms of the proceedings which have been had in this matter up to the time when the resolutions were registered. For, although it was competent to the creditors to resolve, as they have done, that they would accept the composition offered by the debtor, without any proceedings in bankruptcy, those expressions can only mean without any proceedings by them or on their behalf, and cannot have the effect of abrogating or treating, as if they had never been in existence, all acts which had been done before the resolution, and by reason of which alone the resolution could be passed or registered. Still less can they mean that they are to deprive the execution creditor of the proceeds of his execution, and hand over those proceeds to the debtor, nor can it be doubted that, for the purpose of doing complete justice, the Court must of necessity decide the question which has thus arisen between the debtor and the execu-

C. J. B. 1871

Ex parte SHERIFF OF MIDDLESEX. *In re* ENGLAND.

8 Ch 744

tion creditor and the sheriff, and must protect the sheriff against the unwarrantable proceeding of the debtor. To suppose that when once the resolutions for a composition have been registered, the power and jurisdiction of the Court over the whole subject comes to an end and ceases, would be wholly contrary to the very words of the statute, as well as to its plain import and effect.

It would be a strange state of the law if the Court, which is empowered to restrain an execution until it shall be ascertained to whom the subject of the execution belonged, shall be unable to restore the parties to their original rights. The injunction was granted at the instance of the debtor, not for his benefit or in respect of any right which he had to interfere with the process, but only conditionally and provisionally, if (in the further proceedings in bankruptcy which the debtor had instituted upon an allegation that he was insolvent, and upon his doing an act which might be made available against him for adjudication), the rights of the creditors should be found, for whatever reason, to be paramount to those of the execution creditor.

The creditors, who must be taken to know best their own interests, think fit to relinquish all the rights they had to prosecute their claims in bankruptcy, and to insist on a distribution of all the debtor's estate and effects, and choose rather to accept instead the personal engagement of the debtor to pay them a composition. And what is the consequence of this state of things? It was pressed upon me in the argument that the result of the resolution was, that the bankrupt, or rather debtor, was freed from all his debts except only as to the composition, and that he was restored to the same position and with the same rights as before he presented his Petition; and so undoubtedly he is. But before he presented, and when he presented his Petition, the goods in question had been seized by the creditor, who had obtained judgment against him. The debtor could not have then prevented the sheriff from selling, except by the proceeding in bankruptcy to which he had recourse. That proceeding having been terminated in the manner I have adverted to, the debtor and the creditor are in exactly the same condition as they were in before the Petition, save only that (which cannot now be prevented) the creditor has been delayed and put to expense and trouble which might and ought to have been avoided.

C. J. B.
1871
Ex parte SHERIFF OF MIDDLESEX. *In re* ENGLAND.

But it would be placing them in totally different positions if I were now to deprive the creditor of the rights which he had acquired under his execution, and to permit the debtor to take any proceedings against the sheriff, who, by his enforced obedience to the order of this Court, has been prevented from discharging his duty to the execution creditor.

Upon the subject of the jurisdiction of this Court over the debtor, I have not the slightest doubt; nor have I any more doubt that, in order to do complete justice in this "case of bankruptcy," which the debtor has brought within the cognisance of the Court, I must restrain him from proceeding in the action which he has commenced against the sheriff, and from taking any other proceedings against the sheriff in respect of the execution levied by Mr. *Saul.*

If the contention which this debtor has raised were allowed to prevail, it would open the door to very flagrant injustice; for, as happens not unfrequently, the majority of a man's creditors may be so connected with or related to him that they would be willing to accept a very small, or even a nominal composition, if by so doing they could wrest from an execution creditor the fruits of his proceeding, in order to bestow them on a bankrupt. The result of my experience is, that in many cases of composition the utmost vigilance is requisite in order to prevent practices by which creditors may be very unjustly dealt with. But however this may be in other cases, I think the justice of this Court would be both lame and blind, if it could not prevent the attempt which has been made by the debtor in this case to deprive the creditor of his right, and to harass a public officer of the law for acting in the strict and plain discharge of his duty, and this after the discharge of that duty has been obstructed and impeded by the debtor's own proceedings in this Court.

The order for the injunction will issue in the terms I have mentioned; and the debtor, *P. N. England,* must pay the costs of the parties served with the sheriff's application.

Solicitors: Messrs. *Dalton & Jessett;* Mr. *W. Maynard;* Mr. *E. F. Marshall.*

Affirmed on appeal 10 June 1871

V.-C. M.
1871
June 23.

In re DAVIS' TRUSTS.

Trustee Acts, 1850 *and* 1852—*Constructive Trusteeship—Appointment of new Trustees—No Trustees originally appointed.*

The Court has jurisdiction, under the *Trustee Act*, 1850, and the *Trustee Extension Act*, 1852, to recognise a constructive trusteeship of stock within the meaning of that term as used in the Acts, and to appoint trustees of a will, so far as regards that stock, in place of the constructive trustees, notwithstanding that no trustees were originally appointed by the testatrix.

THIS was a Petition presented In the Matters of the *Trustee Act*, 1850, and the *Trustee Extension Act*, 1852, and In the Matter of the Trusts of the Will of *Marian Davis* deceased, so far as regarded a legacy of £500 thereby bequeathed to *Charles Drew* and *Susan Drew*, his wife, and their children. It sought the appointment of trustees and a vesting order under the following circumstances :—

The testatrix, by her will, dated the 30th of September, 1849, after directing payment of her debts and funeral and testamentary expenses, gave and bequeathed the interest, dividends, and annual proceeds of the sum of £500 to *Charles Drew* and the Petitioner *Susan Drew*, his wife, for their lives and the life of the longer liver of them, and after the decease of the survivor of them the testatrix gave and bequeathed the said sum of £500, or the stock or funds upon which the same should be invested, unto and to be equally divided between the children of *Susan Drew* by *Charles Drew*, share and share alike. And the testatrix, after several pecuniary and specific legacies and bequests, and a bequest of the residue of her estate, appointed *Charles Drew* and *Benjamin Cooper* executors of her will.

The testatrix died in 1850, and her will was proved by *Charles Drew* and *Benjamin Cooper* in the same year.

The legacy of £500 given by the will was not in any way vested in or under the control of any trustees, and in none of the bequests in the will contained was there the machinery of trustees, nor did the will contain any power for the appointment of new trustees or a new trustee, or any provisions for the investment of funds by the will bequeathed.

At the time of the testatrix's death certain moneys belonging to her were deposited in her name with Messrs. *Felix Calvert & Co.*, the brewers, and out of these moneys the executors set apart or appropriated in their names the sum of £500 sterling for the purpose of satisfying the above-mentioned legacy of £500.

Subsequently Messrs. *Calvert & Co.* suspended payment, and a company styled the *City of London Brewery Company* was formed under the Joint Stock Companies Acts of 1856 and 1857 for continuing their business, and shares in the new company were allotted, in lieu of their claims, to the creditors of Messrs. *Calvert & Co.*, and amongst others to *Benjamin Cooper*, who was then the sole surviving executor of the testatrix's will, in lieu of the £500 sterling above referred to. These shares were afterwards converted into ordinary stock of the company, the result of which was that the sum of £450 ordinary stock of the company registered in the name of *Benjamin Cooper* became, and at the date of the Petition was, the substitute for the above-mentioned sum of £500 sterling.

Charles Drew died on the 20th of July, 1855. *Benjamin Cooper* died on the 13th of February, 1870, in a union workhouse, intestate and in insolvent circumstances, and no administration had been or was likely to be taken out to his estate.

Inasmuch as *Benjamin Cooper* had died intestate and without a legal personal representative, the company declined to transfer the said sum of £450 stock out of the name of *Benjamin Cooper* into the names of any nominees of the persons beneficially entitled, or to pay the dividends on the stock.

Under these circumstances the Petition was presented by *Susan Drew* and her children and the husbands of married daughters. No settlements had been executed upon the occasion of or after the marriages of any of the latter. All the Petitioners were adult.

The Petition sought—1. An expression of the opinion of the Court that *Benjamin Cooper* was a trustee of the £450 ordinary stock in the company and the dividends thereon within the meaning of the *Trustee Act*, 1850, and the *Trustee Extension Act*, 1852, for the benefit of the Petitioners, according to their respective rights and interests therein as amongst themselves under the testatrix's will. 2. An appointment under the 32nd and 35th sections of the first of the Acts and the 6th section of the second,

V.-C. M. 1871 *In re* DAVIS' TRUSTS.

of two new trustees of the testatrix's will in the place of *Benjamin Cooper*, so far as such will had reference to the aforesaid legacy of £500 thereby bequeathed as aforesaid, and a vesting of the right to call for a transfer of the £450 ordinary stock standing in the books of the company in the name of *Benjamin Cooper*, and to receive the dividends thereafter to accrue on such stock, in the new trustees upon the trusts of the testatrix's will so far as the same had reference to the legacy of £500 thereby bequeathed. 3. Alternative relief in case the Court should be of opinion that it had no jurisdiction to make the order previously sought; and, 4, General relief.

Mr. *Horton Smith*, for the Petitioners, submitted that the Petition being presented under the *Trustee Act*, 1850, and the *Trustee Extension Act*, 1852, the Court could, under the 2nd section of the former Act, sub-sect. 11, express its opinion in conformity with the 1st paragraph of the prayer of the Petition, and under the 32nd and 35th sections of the same Act, and the 6th and 9th sections of the subsequent Act, had jurisdiction to make the order sought by the 2nd paragraph of the prayer. The only difficulty arose from the fact that no trustees had been originally appointed by the testatrix; in which case it seemed doubtful whether such an order as he now sought would not, if made, be of first impression: *Dodkin* v. *Brunt* (1).

SIR R. MALINS, V.C.:—

Under this will the executors had the direction of the personal property bequeathed by it, and in my opinion they became constructive trustees of this legacy under the Act of 1850. In consequence of the death of the trustees, and there being no personal representative of the survivor, there is a deficiency of trustees, and it becomes necessary to appoint new trustees. This the Court has power to do under the provisions of the *Trustee Extension Act*, 1852; therefore the order will be according to the 1st and 2nd paragraphs of the prayer of the Petition—that is to say, it will be prefaced with an expression of the opinion of the Court that *Benjamin Cooper* was a trustee of the stock, as sought by the

(1) Law Rep. 6 Eq. 580.

1st paragraph of that prayer, and there will be an appointment of new trustees, with a vesting order, as prayed by the 2nd paragraph.

Mr. *Horton Smith* said they proposed to appoint two of the husbands of the married daughters of Mrs. *Drew* to be the new trustees.

The VICE-CHANCELLOR acquiesced in this proposal.

Solicitors: Messrs. *Ravenscroft & Hills.*

V.-C. B.

1871

Jan. 28;
April 22.

In re BELLASIS' TRUST.

Executory Settlement, how to be executed—Joint Tenancy—Effect of surrounding Circumstances.

B., in 1842, transferred to three persons a debenture, without any declaration of trust other than an expression in a letter written by him to his solicitor shortly before the transfer, in which the three persons were named as trustees, and the trusts of a proposed settlement of the debenture were stated to be "for my niece Mrs. *C. M.* and her children":—

Held, that a valid trust was declared by the letter in favour of *C. M.* for life, and afterwards of her children as joint tenants.

The transferees of the debenture were already trustees of a will, which contained limitations for the benefit not only of Mrs. *C. M.* and her children, but of the issue of deceased children, and from contemporaneous entries in a solicitor's book it appeared that, after the date of the letter, *B.* said he had made up his mind to transfer to the same three persons, "without stating any trust or condition;" also that *B.* was advised to take a letter from them that they held the debenture upon the same trusts as the will; but no trace of any such letter appeared.

The trustees paid the income to Mrs. *C. M.* during her life, and upon her death transferred the fund into Court. There were issue of deceased children of *C. M.*:—

Held, that a trust for the issue of the deceased children had not been sufficiently declared.

Petition.

On the 6th of December, 1842, General *Edward Hutchins Bellasis*, being possessed of a debenture of the trustees of the *Oriental Club, Hanover Square*, for the sum of £1000, by deed transferred the same to three persons, named *John Milford*, *John Geare*, and *John Edwards*. The deed did not contain any declaration of trust.

General *Bellasis* died on the 16th of August, 1843, having by will, dated the 4th of June, 1842, given all his personal estate and effects to his wife, *Ann Susan Bellasis* (now *Ann Susan Teed*), absolutely, and appointed her sole executrix.

In January, 1847, the debenture was sold, and the proceeds invested in the names of the same three persons in £1087 3*s.* Reduced £3 per Cent. Annuities.

The interest of the debenture and the dividends of the stock

were paid to *Charlotte*, wife of *Charles Milford*, a niece of General *Bellasis*, during her life. She survived her husband, and died on the 8th of January, 1870.

On the 4th of July, 1870, *John Milford* and *John Edwards*, who had survived *John Geare*, filed an affidavit, intituled in the matters of the trusts of the sum of stock and of the *Trustee Relief Act*, stating the above facts, and that so far as they were aware, there never was any deed of settlement or other instrument executed, declaring the trusts upon which they and *John Geare* held the debenture, but that the dividends had been paid by them in pursuance of what they understood and believed were the intentions of General *Bellasis*.

On Mrs. *Milford's* death they caused inquiries to be made, and, in consequence, Mr. *Indermaur*, of *Devonshire Terrace, Marylebone*, who was the successor in business of Mr. *Edmund Sharp*, formerly of the same place, wrote to their solicitors as follows:—

"The late Mr. *Edmund Sharp* was solicitor in some matters for the late General *Bellasis*.

"I looked amongst some of the old papers of Mr. *Sharp*, and I found the following documents, namely:

"1. A copy of a bond dated the 1st of January, 1837, from the trustees of the *Oriental Club* to Colonel *Edward Hutchins Bellasis*, for £1000 and interest.

"2. A letter, of which the following is a copy:

"'My dear Sir,—I shall leave the settlement for my niece until I can arrange for proper trustees, as it would be unadvisable to make the indenture over to her. I shall therefore be obliged by your closing your account, and sending it to me, . . .

"'*Edward H. Bellasis*,

"'*Edmund Sharp*, Esq. 81, *Oxford Terrace*,

"'8th June, 1842.'

"3. A draft bill of costs of Mr. *Sharp* against General *Bellasis*, in which are the following items, viz.:—

"'Yourself to Mrs. *Charles Milford*.

"'May 31, 1842. Attending you; received instructions to make transfer of a debenture of the *Oriental Society*, dated the 1st of January, 1837, for £1000, to your niece Mrs. *Charlotte Milford*,

V.-C. B. 1871 *In re* BELLASIS' TRUST.

the wife of *Charles Milford*, Esq.; received form of transfer and debenture; and received instructions to indorse the transfer on the debenture.

"'June 4. Engrossing memorandum of transfer of this debenture in part; but in consequence of Mrs. *Milford* being married,

"'Attending you; informing you that Mr. *Milford* would be entitled to the benefit of such transfer, and that Mrs. *Milford* could not receive the dividends without his signature; in consequence of which you deferred the completion of the transfer for the present.'

"4. Letter from General *Bellasis* to Mr. *Sharp*, as follows:—

"'81, *Oxford Terrace, Hyde Park*,

"'30th Nov., 1842.

"'My dear Sir, . . . Inclosed is the indenture (of) which at our last meeting we deemed it advisable to delay signature. During my visit to *Exeter* I had an opportunity of arranging matters with the trustees, and with your kind assistance we shall be able to execute the paper now sent to be filled up, in readiness for execution. The following gentlemen are the trustees: *John Milford*, Esq., *Coaver, Exeter, Devon; John Geare*, Esq., solicitor, *Exeter, Devon;* Rev. *John Edwards, Prestbury, Cheltenham, Gloucestershire.* The indenture unto the above-named trustees for my niece Mrs. *Charles Milford* and her children. And if Saturday next, the 3rd of December, about 12 o'clock, will be convenient to you to favour me with a call, I will get General *Durant* to attend, that I may sign it in your presence.

"'Yours very sincerely,

"'*Edward H. Bellasis.*

"'*Edmund Sharp*, Esq.'

"5. Entries in Mr. *Sharp's* ledger 'D,' viz.:—

"'General *Bellasis.* Yourself and Mrs. *Charles Milford.*

"'Dec. 1st, 1842. On receiving letter from you, inclosing debenture of the *Oriental Club*, and requesting me to indorse a transfer upon it for the benefit of Mrs. *Milford* and her children, and appointing Saturday next to execute same, letter to you thereon, informing you that there were objections to the transfer proposed by you, and that I would call on you on Saturday to confer with you thereon.

" '3rd. Attending you; informing you that if the transfer was to be made to trustees for the benefit of Mrs. *Milford* and her children, the trust must be declared by a deed, when you said you had made up your mind to transfer the debenture to the three persons named in your letter of the 30th ult., without stating any trust or condition. Advising you to take a letter from them, that they held it upon the same trusts as certain property given to Mrs. *Milford* and her children by the will of Mr. *Milford's* mother.

" '6th. Drawing transfer of debenture of the *Oriental Club*, dated the 1st of January, 1837, to *John Milford*, Esq., *John Geare*, Esq., and the Rev. *John Edwards*. Engrossing same on debenture. Attending you; reading over and attesting your execution of transfer.

" 'Copy transfer indorsed upon said bond.' "

Mr. *Indermaur* said he had been unable to find any deed or draft of a deed of settlement.

They further stated that by the will of Mr. *Milford's* mother above referred to, certain leaseholds and pure personalty were conveyed and assigned to the above-mentioned *John Milford*, *John Edwards*, and *John Geare*, upon trust to pay the income to Mrs. *Charlotte Milford* for life, for her separate use, without power of anticipation, and after her decease upon trust for her then present and future children by her husband *Charles Milford*, who should be living at the time of her death, equally, as tenants in common, and the issue then living of any then deceased child or children who should be living at the time of her decease, such issue to take the part or parts only which would have belonged to their respective parent or parents if living, as between themselves as tenants in common.

They said they believed that General *Bellasis* selected them and *John Geare* to be trustees of the debenture, because they were the trustees of the last-mentioned will for the benefit of Mrs. *Milford* and her issue; and they believed that the General must have intended that the debenture, and the money secured thereby, should be subject to the same trusts as those declared by the will; but they had been unable to find any written evidence of such intention; nor did they remember any conversation with the General in relation thereto. They believed that whatever passed

V.-C. B. 1871 *In re* BELLASIS' TRUST.

between the General and the trustees took place between him and *John Geare.*

Soon after filing the above affidavit the trustees transferred the fund into Court.

Charlotte Milford had nine children, four of whom died in her lifetime: one, an infant, before the date of the transfer by General *Bellasis;* the others, adults, after the date of such transfer, one of whom, *Mary,* wife of *Charles William Hogg,* left two infant children, and another, *Lucy,* wife of *Joseph Carter,* left one infant child. The third died without having been married.

The present Petition was presented by three of the surviving children of *Charlotte Milford,* submitting that, under the above circumstances, a valid trust was created of the sum of £1000 secured by the debenture in favour of *Charlotte Milford* during her life, and after her death for her children as joint tenants; and prayed for a declaration accordingly, and that the sum of stock might be sold, and the residue, after payment of costs, paid in fifths to the Petitioners and the other two living children of Mrs. *Milford,* or to the husbands of such of them as were married women.

The Petition came on upon the 28th of January, and was directed to stand over, with liberty to make General *Bellasis'* legal personal representatives Respondents; but they did not appear.

The infant child of *Lucy Carter,* deceased, was residing at *Melbourne,* and had not been served; but as the infant children of the other deceased daughter appeared, the Court considered that service on the child who was abroad might be dispensed with.

Mr. *W. P. Dickins,* for the Petitioners:—

That the representatives of the deceased children of Mrs. *Milford* have no claim, appears from *Kilpin* v. *Kilpin* (1).

The surviving children take as joint tenants.

The VICE-CHANCELLOR said he was with the Petitioners upon this point.

Mr. *Lindley,* and Mr. *Crossley,* for two sets of Respondents in the same interest as the Petitioners.

(1) 1 My. & K. 520.

Mr. *Bunting*, for the infant children of one of the deceased daughters of Mrs. *Milford*:—

That it was intended to exclude the children of the deceased children of Mrs. *Milford* is improbable.

The expression in General *Bellasis'* letter clearly does not amount to a declaration of trust. Then what is the result of the solicitor's entries? That the General proposed first to transfer the debenture to Mrs. *Milford*, and then to trustees "for the benefit of her and her children;" but that, upon being told by the solicitor that there were objections, he made up his mind to transfer it to the trustees of her mother's will, "without stating any trust or condition." Upon this he was advised to "take a letter" from the trustees, that they held it upon the same trusts as declared by the will. Whether this was ever done or not does not appear; but he certainly transferred the debenture to the trustees. The result is sufficient to establish, by reference to the trusts of the will, a trust in favour of the issue of deceased children.

Mr. *C. Barber*, for the trustees.

SIR JAMES BACON, V.C.:—

In this case it is, of course, useless to speculate upon what General *Bellasis* may have intended to do. If he had made a formal declaration of trust, or taken such a letter as was suggested to him, the matter would have been free from doubt; but he did not do so.

The case is, no doubt, involved in much obscurity; and the documentary evidence is far from satisfactory. [His Honour reviewed the facts, and having read the letter of the 30th of November, 1842, continued:—]

Some effect must be given to this letter, and I do not see how it is possible for the Court to add to the terms of it. Those terms are, no doubt, open to qualification, if sufficient ground for such qualification should appear. But there seems to have been no uncertainty in the donor's mind. The wording is the simplest that can be conceived—"for my niece Mrs. *Charles Milford* and her children." There being this form of expression, and nothing more, I am constrained to hold that the trust must be declared to have been

V.-C. B. 1871 *In re* BELLASIS' TRUST.

for Mrs. *Milford* for life, with remainder to her children as joint tenants.

A suggestion has been made of a trust by reference, arising from the donor's selection of these particular persons, who were trustees of a will under which Mrs. *Milford*, her children, and the issue of deceased children were interested. But there is no trace of any intention on his part that they were to hold this fund upon the like trusts, nor did the trustees sign any declaration to that effect; and all possibility of guessing that the trustees were intended to hold the fund upon the trusts of the will is excluded by the circumstance that the survivors are unable to recollect any conversation in which General *Bellasis* expressed any wish on the subject.

From the entries in the solicitor's book we learn that he was advised to take a letter from the trustees to the effect which has been contended for; but no such letter appears to have been written; and the only inference the Court can draw is, that the advice was not followed, and that General *Bellasis* adhered to his former resolution, as expressed in the letter of the 30th of November, 1842. So far the result of the evidence is in favour of the Petitioners.

Under these circumstances I can give effect only to the words which he has himself used; and that being so, the order will be as prayed by the Petition. The costs of all parties as between solicitor and client will come out of the fund.

Solicitors for the Petitioners: Messrs. *Whyte, Collisson, & Prichard.*

Solicitors for Respondents in the same Interest: Messrs. *Jones, Roberts, & Hale;* Messrs. *Sawbridge & Wrentmore.*

Solicitors for the Infant Grandchildren: Messrs. *Meredith & Co.*

Solicitors for the Trustees: Messrs. *Dobinson & Geare.*

REES *v.* ENGELBACK.

V.-C. B.
1871
April 25, 26.

Will—Devise—Trust or Condition—Bill by Annuitant against specific Legatee —Parties—Demurrer overruled.

Testator devised and bequeathed to his executors and trustees a lease of a house and premises in which his trading business was carried on, and all the stock-in-trade, fixtures, machinery, utensils, and effects at the time of his death used in the same business, and the goodwill of the same, upon trust to permit his son to carry on the business, and use and occupy the house, premises, and effects "upon the terms and conditions following:" that was to say—that he, the son, should, during the joint life of the testator's daughter, and widowhood of his widow, pay to each of them an annuity; and after various other provisions he directed that from and after the decease of the wife and daughter in the lifetime of the son, the trustees should execute to the son an assignment of the house, premises, fixtures, machinery, and effects. If the son should cease to carry on business, the above property was to be subject to the trusts of the testator's residuary estate, and the son was to be excluded from all benefit under the will. Testator then declared the trusts of his residuary personalty in favour of his wife, son, and daughter above mentioned.

A bill having been filed by the sole acting executor and trustee against the son and daughter for administration, in which it was alleged that the son had made default in payment of the annuities, and an answer having been filed by the son in which he stated that no application had been made to him by the daughter for payment of her annuity, and that it was his intention to pay the annuity bequeathed to the testator's wife, the daughter filed the present bill, praying for a declaration that she was entitled to the annuity bequeathed to her by the will, for an account, and other relief.

Upon demurrer to so much of the bill as prayed for the account and other relief, and answer as to the rest:—

Held, that the Defendant had incurred a personal liability to pay the annuity, and that he had by his answer confessed an equity:

Held, further, that, under the circumstances, the executor was not a necessary party to the suit.

Demurrer for want of equity and want of parties overruled.

DEMURRER AND ANSWER.

Thomas Charles Engelback, glass-cutter, died on the 28th of February, 1869, having by will, dated the 20th of December, 1867, devised and bequeathed to his executors and trustees therein named all his term and interest in the premises in which at the time of his decease his trade or business should be carried on, and also his stock-in-trade, fixtures, machinery, plant, imple-

V.-C. B. 1871 REES v. ENGELBACK.

ments, utensils, and effects which at the time of his decease should be used in his said trade or business, and the goodwill thereof, together with the policies of insurance from fire of the said stock-in-trade, and also the moneys and debts which should be owing to him in respect of the said trade or business and otherwise, and the furniture, books, plate, linen, china, and residue of his household goods and effects, and all the residue of his real and personal estate and effects over which he might have or possess any disposing power; upon certain trusts as to part of his household furniture for his wife, and upon further trust that his trustees or trustee should permit and suffer his son *John Hugh Engelback* to carry on, manage, and conduct his (the testator's) said trade or business, and to use and occupy the house and premises No. 10, *Thrawl Street, Spitalfields*, in which the same was carried on by him, and such parts of the yards of the houses Nos. 8 and 9 in the said street as were then used by him for the purposes thereof (*J. H. Engelback* paying the rent and performing and observing all the covenants and conditions reserved and contained by and in the lease under which No. 10, *Thrawl Street* aforesaid was held), and to have the entire use and management of the fixtures, machinery, plant, utensils, implements, and effects thereon belonging to the testator in his said trade or business at the time of his decease, "upon the terms and conditions following" (that is to say): That he, *John Hugh Engelback*, should in each and every year during the life of testator's daughter *Sarah Elizabeth*, wife of *George Rees*, and during such time as *Sarah Engelback*, the testator's wife, should remain chaste and unmarried, lay out and expend the sum of £50 at the least in repairing and keeping the said fixtures, machinery, plant, utensils, implements, and effects in proper working condition, and in reinstating, restoring, and making good such parts thereof as might from time to time be worn out or become defective, satisfactory proof of which yearly expenditure the testator directed should be given to the trustees or trustee for the time being of his said will. And, in the next place, that *J. H. Engelback* should, during the life of *Sarah Elizabeth Rees*, and during such time as the testator's wife should remain chaste and unmarried, pay to the testator's wife an annuity of £104, and to his daughter an annuity of £52, both of which annuities he directed should be payable

weekly, and the first of such payments to be made at the expiration of one week from the time of his decease. And he directed and declared that in the event of *Sarah Elizabeth Rees* dying in the lifetime of her mother, the annuity to be thereafter payable to *Sarah Engelback* alone during such time as she should remain chaste and unmarried should be increased to the sum of £156; but that if *Sarah Engelback* should marry again, or become unchaste, or die in the lifetime of *Sarah Elizabeth Rees, Sarah Elizabeth Rees* should thereupon become entitled to, and the testator directed his son *J. H. Engelback* thenceforth to pay to her, an annuity of £104 in lieu of the said annuity of £52, payable as aforesaid. And the testator directed and declared that from and after the decease of his wife and daughter in the lifetime of his son, or other sooner determination as aforesaid of both the said annuities, the trustees or trustee of his will should make and execute to his son, at his own costs and charges, such assignments and assurances as should be requisite for effectually vesting the house and premises No. 10, *Thrawl Street*, and the parts of the yards of the adjoining houses, Nos. 8 and 9, and the fixtures, machinery, plant, utensils, implements, and effects, and putting him into full and complete possession thereof.

Testator further directed that from and after the decease of his son during the continuance of the annuities, or in case he should be unwilling to carry on and manage his (testator's) trade or business, or should become bankrupt or execute an assignment for the benefit of creditors, or should omit or relinquish the carrying on or management of the same, the goodwill of the trade, fixtures, and effects, and also the house and premises, should be subject to the trusts thereinafter declared respecting his residuary estate. He also directed that if his son should be unwilling to carry on and manage his (testator's) business, or should whilst carrying on the same become bankrupt or execute an assignment for the benefit of creditors, or omit or relinquish the carrying on or management of the same, and carry on the same business elsewhere in *England* than at No. 10, *Thrawl Street*, thenceforth his son should be wholly excluded and barred from all benefit, advantage, and interest under his will; and should refund to the trustees the full value of any benefit he might have received thereunder.

V.-C. B.
1871
REES
v.
ENGELBACK.

Testator then declared the trusts of his residuary personalty in favour of his wife and two children above mentioned; and appointed as his executors and trustees *Matthias Butcher King*, and two other persons who renounced probate, and by deed disclaimed the trusts.

On the 9th of August, 1870, the present bill was filed by *Sarah Elizabeth Rees*, by her next friend, against *John Hugh Engelback* and *George Rees*, her husband, stating the above facts, and that the Defendant *J. H. Engelback* had carried on and managed the testator's business at the premises in *Thrawl Street*, and had the use of the fixtures, machinery, plant, and effects; that on the 13th of November, 1869, a suit of *King* v. *Engelback* was instituted by the executor and trustee against *J. H. Engelback* and Mr. and Mrs. *Rees* for administration, in which the Plaintiff *King* "alleged, among other things, and as the fact is, that the said *John Hugh Engelback* had from time to time made default in the payment to the said *Sarah Engelback* and *Sarah Elizabeth Rees* respectively of the sums of money which had accrued due and payable in respect of the said annuities of £104 and £52 now payable to them respectively, and that the said *Sarah Engelback* and *Sarah Elizabeth Rees* respectively had repeatedly made complaints and applications to the said *Matthias Butcher King* with respect to the arrears of such annuities, but that the said *Matthias Butcher King* was advised that he could not, as the testator's executor and trustee, take any proceedings against the said *John Hugh Engelback* in respect of arrears."

The bill also alleged (par. 5) that "the Defendant *John Hugh Engelback*, by his answer filed in the said suit, stated (par. 26) that no application had been made to him by the said *Sarah Elizabeth Rees* for payment of the said annuity of £52, and also stated (par. 30) that he intended to carry on the said business according to the said will of the said testator, and desired to do so without further molestation or unnecessary interference on the part of the said *Matthias Butcher King*, *Sarah Engelback*, *George Rees*, or *Sarah Elizabeth Rees*, so that he might be enabled out of the profits of such business to pay the annuity bequeathed by the said will to the said *Sarah Engelback*."

The bill then alleged that the Defendant *J. H. Engelback* had

paid to *Sarah Engelback* various sums, amounting to £80 and upwards, in respect of the annuity of £104, but that he had made no payment whatsoever to the Plaintiff in respect of her annuity of £52.

The bill prayed (par. 1) for a declaration that the Plaintiff was entitled to be paid the annuities of £52 and £104 at the times and in the manner mentioned in the will, and (in the following paragraphs) for an account and payment in respect of the same; for an account of profits; and a declaration that the annuities were by the will charged upon the trade or business and the profits thereof, and upon the house and business, and the fixtures, machinery, and effects; and that the Defendant *J. H. Engelback* was a trustee of the same trade, business, profits, and premises for payment of the annuities; for a receiver; if necessary, for a sale or mortgage of the premises; for all necessary accounts and inquiries and directions; for costs and further relief.

To this bill the Defendant *J. H. Engelback*, on the 2nd of December, filed a demurrer and answer.

As to so much of the bill as sought that "an account may be taken as prayed by the 1st paragraph of the prayer" of the bill, and as to the relief prayed by the 3rd and succeeding paragraphs of the prayer, the Defendant demurred, and for cause of demurrer shewed that the testator, after bequeathing certain chattels to his wife, bequeathed all his residuary estate and effects unto *King* and the other two trustees "upon certain trusts declared in and by his said will," and appointed them executors; that *King* was now the sole legal personal representative of the testator; and that the suit of *King* v. *Engelback* "is now pending" for the administration of the testator's estate, and for carrying into effect "the trusts" of the will; and that the Plaintiff had not made such a case as entitled her to discovery or relief; and for further cause of demurrer shewed that in any case *King* and Mrs. *Engelback* were necessary parties; wherefore he prayed the judgment of the Court whether he should be compelled to make any answer to such parts of the bill as he had thereinbefore demurred to; and in answer to the residue of the bill, or to so much thereof as he was advised it was material or necessary for him to answer, stated to the following effect:—

After stating the facts of the filing of the bill, and its main

V.-C. B. 1871 REES v. ENGELBACK.

allegations, the filing of the answer, the facts relating to the testator's property and business, the Defendant said that in or about January, 1866, the testator agreed to take the Defendant into partnership with him on equal terms, and to permit Defendant to draw for his maintenance, on account of his share of the profits, £3 per week, and agreed that the business should be carried on under the firm of "*Thomas Engelback & Son*;" that the business was thenceforth, and down to the testator's death, carried on in partnership on the above terms, the Defendant being recognised and held out by the testator as a partner. He added:—

"By my said answer I submitted to the Court whether or not, under the circumstances aforesaid, the testator was in fact solely interested in the said business and entitled to all the property, assets, and effects employed therein or belonging thereto, or whether or not I was a partner with him in the said business."

He said that since the testator's death, "as the surviving partner," he had carried on the business; that the premises No. 8, *Thrawl Street*, had been usually let, and that by his answer he had stated he was ready and willing to account to *King* for such rents, subject to an alleged right of set-off for balances due to him from the testator's estate. He added:—

"By my said answer I claimed and I still claim to be entitled, under the testator's will, to the sole beneficial interest in the house and premises No. 10, *Thrawl Street*, and to such parts of the yards of the houses Nos. 8 and 9 in the said street as were used for the purposes of carrying on the said business at the time of the testator's death, and to the said factory, for the residue of the terms for which the said premises were respectively held at the time of his death, subject as in the said will mentioned, and all such fixtures, machinery, plant, utensils, implements, and effects thereon as belonged to the testator at the time of his decease, upon the terms and conditions in the said will in that behalf mentioned, such premises being connected with and necessary for carrying on the said business, to which I became entitled upon his death . . ."

"The said bill and answer in *King* v. *Engelback* fairly and fully raised, as I am advised and believe, for the decision of the Court all the questions at issue between myself and all other parties

interested under the will of the testator, and (*inter alia*) whether I was and ought to be treated as a partner in the said business, and my rights and liabilities and the rights of the several other *cestuis que trust* under the said will."

He further said he was advised that, pending the suit of *King* v. *Engelback*, he could not safely or properly pay any sum on account of the money bequeathed by the will to the Plaintiff.

He further said that he had paid to his mother divers sums in that behalf mentioned in his answer in *King* v. *Engelback*, but under the circumstances in such answer and in the present answer set forth, he had made no payment to his sister in respect of the annuity bequeathed to her by the will; and he insisted that such annuity was not a charge upon the business or the goodwill thereof; also that he claimed to be entitled to the business as surviving partner.

He denied that the Plaintiff was entitled to be paid the annuities out of the business, or the proceeds or profits thereof, and submitted that, at all events, such question could properly and ought to be determined in *King* v. *Engelback;* and that the present suit was unnecessary and vexatious.

Mr. *Fry*, Q.C., and Mr. *Locock Webb*, for the demurrer:—

The demurrer speaks of "an account as prayed by the first paragraph of the bill." This is a clerical error. What is meant is, the account prayed by the second paragraph. To the declaration alone we do not demur.

The Defendant's case, in substance, is, that the house and business were bequeathed to him, and are absolutely his, subject to the performance of certain conditions—as to which, if there has been a breach, which he denies, the Plaintiff, whether or not she has a remedy elsewhere, has no remedy in this Court. His further case is, that he has offered to account for the property as a partnership asset in the former suit, in which all questions may be decided, so that this suit is unnecessary.

If, on the other hand, the Court should hold this to be a devise in trust to pay the annuities, then it is plain that the executor has not assented to the bequest, and that he is a necessary party.

In order to constitute a speaking demurrer, the new facts, aver-

V.-C. B. 1871 REES v. ENGELBACK.

ments, or arguments introduced must be material: *Cawthorn* v. *Chalie* (1); *Davies* v. *Williams* (2). This demurrer does not disclose any fact not in the bill. The necessity of answering as to part of the bill was caused by the allegation in the bill as to what the Defendant had stated by his answer in the former suit. This allegation made it necessary for the Defendant to state what he really had said. Any technical objection on this head is removed by Cons. Ord. XIV. Rule 9.

The bill should have been filed against the executor. Where a bill by a residuary legatee was filed against the executor, the other residuary legatee, and a debtor, the bill, not suggesting fraud or negligence in the executor, was dismissed as against the debtor: *Beckley* v. *Dorrington*, cited by Lord *Eldon* in *Alsager* v. *Rowley* (3). As to the power of an executor, we refer to *Earl Vane* v. *Rigden* (4) and 15 & 16 Vict. c. 86, s. 42, rule 9.

The bill treats the annuities as if they were payable out of the profits of the business. If this be so, the mother is also a necessary party.

The VICE-CHANCELLOR said he thought there ought not to be two suits.

Mr. *Willcock*, Q.C., and Mr. *Yate Lee*, for the bill:—

If the Defendant wishes to get rid of this suit, he has only to pay the money.

As to the alleged error; no doubt there is an error, but does it consist in the substitution of the words "an account" for "a declaration," or of the word "first" for "second"? If the demurrer does not extend to the declaration, the whole of the rest of the relief prayed by the bill follows as a matter of course.

That these annuities are a charge in equity on the business, goodwill, and premises, and that they are impressed with a trust for the Plaintiff, notwithstanding the use of the words "upon the terms and conditions following," appears from *Sugden* on Powers (5); *Wright* v. *Wilkin* (6).

(1) 2 S. & S. 127.
(2) 1 Sim. 5.
(3) 6 Ves. 748, 749.
(4) Law Rep. 5 Ch. 663, 668.
(5) 8th Ed. 106.
(6) 2 B. & S. 232, 259; 7 Jur. (N.S.) 441, 442.

The necessity for this suit is made apparent by the defence of the Defendant to *King* v. *Engelback*. He first (par. 26) excused his non-payment of the Plaintiff's annuity on the ground that it had not been applied for; and then (par. 30) said he intended to carry on the business in order that he might be able, out of the profits, to pay, not the Plaintiff's annuity, but the annuity to Mrs. *Engelback*. In this suit he denies that the Plaintiff is entitled to be paid her annuity out of the business or profits at all; and says that, at all events, such question ought to be determined in *King* v. *Engelback*. That is to say, he says he will resist the former suit to the utmost of his power. Thus it becomes necessary to raise the issue.

The objection as to want of parties is frivolous. It will be sufficient if the executor and the widow are served with a copy of the decree in this suit.

In *East India Company* v. *Coles* (1), though the point was not decided, the Lord Chancellor thought that a demurrer for want of parties to a part of a bill could not be allowed.

The executor is not a necessary party. He has assented to the bequest; and the Defendant has constituted himself a trustee. Even if he has not, from *Messenger* v. *Andrews* (2) it appears that the Defendant has made himself personally liable to pay, and hence accountable in this Court.

That this demurrer would have been overruled under the old law, is plain from *Wetherhead* v. *Blackburn* (3) and other cases.

[Mr. *Fry*:—This we admit.]

The new law does not permit a Defendant to answer the whole or even material portions, to which he has demurred, of a bill. The object of the rule is to get rid of technical objections. Here the Defendant, after demurring to part of the bill, goes on to allege a number of matters which are wholly irrelevant to the parts not demurred to. The only part of the bill to which the Defendant does not (as he says) demur, is that which alleges the Plaintiff's right to the annuity. He does not admit the Plaintiff is entitled; he disputes that statement, and that only. Yet he

(1) 3 Sw. 142, n.

(2) 4 Russ. 478.

(3) 2 V. & B. 121, 124.

V.-C. B. 1871 REES v. ENGELBACK.

goes on to allege a great many matters which are wholly beside the simple question of whether she is entitled to the annuity or not. This is not permissible, even under the new law: *Lowndes* v. *Garnett and Moseley Mining Company* (1); *Mansell* v. *Feeney* (2).

Another objection is that this is a "speaking" demurrer. The bill did not allege that "a suit is pending."

On all grounds the demurrer should be overruled.

Mr. *Fry*, in reply:—

In the cases last cited, the answer and demurrer set up different defences.

The case of *East India Company* v. *Coles* (3) is ambiguous, and quite overweighed by the authority of *Atwood* v. *Hawkins* (4).

If there be a trust created in favour of the Plaintiff, it attaches only to the estate of the survivor. But this is not a trust. In *Messenger* v. *Andrews* (5) a single sum only had to be paid, not as here, a series of instalments. In *Wright* v. *Wilkin* (6), to have held the clause as a condition at law would have been to defeat every intention of the testator.

The Plaintiffs have alleged certain contents of the answer in *King* v. *Engelback*. To those allegations they must be confined; they cannot read the answer itself.

Sir James Bacon, V.C.:—

The demurrer is admitted to be erroneous in its frame, and in its terms, as to the 1st paragraph of the prayer of the bill. I do not know what right or reason I have to permit the demurring Defendant to amend his demurrer *ore tenus* at the Bar. That it is a mistake, I am quite willing to believe.

The demurrer is, first, "as to so much of the said bill as seeks that an account may be taken as prayed by the 1st paragraph of the prayer of the said bill." That is clearly wrong, because the 1st paragraph contains only a prayer for a declaration "that the Plaintiff is entitled to be paid the said annuities of £52 and £104 respectively given to her by the said will of the said testator

(1) 2 J. & H. 282.
(2) Ibid. 313.
(3) 3 Sw. 142, n.
(4) Finch, 113.
(5) 4 Russ. 478.
(6) 2 B. & S. 232; 7 Jur. (N.S.) 441.

Thomas Charles Engelback at the times and in manner mentioned in the said will." Mr. *Fry* would have me read the demurrer as if it did not apply to the 1st paragraph, but as if it applied to the 2nd, which asks "that an account may be taken of what is due to the Plaintiff in respect of the said annuity of £52." Take it in whichever way you will—suppose that the demurrer does not touch, and does not mean to touch, the 1st paragraph, then the bill would be one by which the Plaintiff asks for the declaration which I have read; and, if that declaration were made, it would be the plain duty of the Court at once to direct all inquiries, to make all orders, and give all directions that might be necessary to give effect to that declaration; and there is a prayer for further relief, to which, no doubt, the demurrer in terms applies, but which could have no application if the 1st paragraph remains in the bill, as it is said it should. If the demurrer is taken in its utmost strictness, and the 2nd paragraph is one which is not demurred to, then it is a bill which prays only for an account of what is due in respect of the annuity of £52. It may or may not be that the Plaintiff may establish a right to that at the hearing; and, if so, all necessary accounts and inquiries will be directed, whether prayed for or not. Whichever way I read this first branch of the demurrer, in my opinion it cannot be sustained. It cannot be sustained if it leaves the declaration which is asked for untouched; because, upon that, relief might be founded. It cannot be sustained if the 2nd paragraph remains untouched by the demurrer, because upon that, relief might be granted. But that would be a very unsatisfactory way, no doubt, of dealing with a demurrer of this sort.

The demurrer goes further, and enumerates the several paragraphs of the prayer of the bill other than the 1st and 2nd; it states the will, the appointment of executors, and the renunciation by two, leaving only one acting; and it asserts "that the Plaintiff hath not by her said bill made such a case as entitles her in a Court of Equity to any discovery or relief from or against me touching the matters aforesaid, or any of such matters."

Then it becomes necessary to consider what is the Plaintiffs' complaint. The Plaintiff's complaint is in respect of a personal liability incurred by the Defendant. The Plaintiff sues for the arrears

V.-C. B. 1871 REES v. ENGELBACK.

which she says are due to her for the annuity which began to be payable at the end of a week after her father's death, and payable by the Defendant. She says that he has enjoyed all the benefit which was intended to be given to him by the will, upon the conditions which are mentioned, and he says the same. He, by his answer, in the most distinct manner agrees with the Plaintiff in that respect.

Now it is not necessary to refer to the provisions of the will which have been so often read in the course of this discussion; but the allegations in the bill are to the effect that, since the death of the testator, *John Hugh Engelback* has managed the business, occupied the house as it was used by the testator, and had the entire use and management of the fixtures, machinery, and so on. If that is so, then he has incurred a liability to pay the money, because in his answer he says: "I claimed, and I still claim, to be entitled, under the testator's will, to the sole beneficial interest in the house and premises No. 10, *Thrawl Street*, and to such parts of the yards of the houses Nos. 8 and 9 in the said street as were used for the purposes of carrying on the said business at the time of the testator's death, and to the said factory, for the residue of the terms for which the said premises were respectively held at the time of his death, subject as in the said will mentioned; and all such fixtures, machinery, plant, utensils, implements, and effects thereon as belonged to the testator at the time of his decease, upon the terms and conditions in the said will in that behalf mentioned." Then, is this anything but a personal demand? What does it signify whether he is called a trustee, or whether the conditions upon which he takes exposes him to forfeiture, or however onerous the stipulations under the will may be as to the consequences of not performing the conditions imposed? The Plaintiff says that, a suit being pending by *King*, who is the representative, he (*King*) in that suit alleges that he was advised he could not, as executor and trustee, take any proceedings against *Engelback* in respect of such arrears; and that is not disputed. Mr. *Fry* says I cannot read that passage of the bill in *King* v. *Engelback* into this answer, for the purpose of qualifying or interfering with the demurrer. I think I must read it all as one; and the demurrer being that the Plaintiff has no equity, I think I am bound to see

whether the Defendant in his answer has confessed an equity, or has confessed something which in equity may make him liable. I cannot doubt that that passage and the other passage to which I have called attention do confess such an equity. There is a paragraph in which he says: "The said bill and answer in *King* v. *Engelback* fairly and fully raised, as I am advised and believe, for the decision of the Court, all the questions at issue between myself and all other parties interested under the will of the testator, and (*inter alia*) whether I was and ought to be treated as a partner"—a question with which the Plaintiff has nothing to do. According to the frame of her bill, her case is this: *John Engelback*, having taken possession of the testator's effects upon the conditions mentioned in the will, has become liable to pay to her every week, after he so took possession, the annuity; and *John Engelback* says he did so take possession, and he took it upon the terms and conditions of the will. Whether a decree can be made upon all the facts as prayed for by the bill is not a matter for me to inquire into. What I have to inquire into is, whether, if the case as made by the bill should be established at the hearing, the Plaintiff will be entitled to a decree. Upon the grounds I have stated, if the facts which will have to be proved whenever the case comes to be heard are proved, I think nobody can deny that the Plaintiff will be entitled to a decree. In the bill it is also alleged that, by the answer of *Engelback*, he stated that no application had been made to him, and he also stated "that he intended to carry on the said business according to the said will of the said testator, and desired to do so without molestation or unnecessary interference on the part of *Matthias Butcher King*, *Sarah Engelback*, *George Rees*, or *Sarah Elizabeth Rees*, so that he might be enabled, out of the profits of such business, to pay the annuity bequeathed by the said will to the said *Sarah Engelback*." Now, upon the authority of the case of *Messenger* v. *Andrews* (1), and even without the authority of that case, upon very plain principles of justice and law, the Defendant, who admits that he has enjoyed the benefit given to him by a will upon the conditions expressed in it, is under a personal liability, which can be enforced in this Court, of fulfilling those conditions.

(1) 4 Russ. 478.

V.-C. B. 1871 REES v. ENGELBACK.

It is quite clear to my mind, therefore, upon these pleadings as they stand, the demurrer, for want of equity, cannot be allowed.

The same observations apply to the demurrer for want of parties. At first I thought it impossible that the suit could go on without the presence of the legal personal representative; but looking to the real nature of the Plaintiff's case, I do not see any such necessity at all. If she should succeed in the suit upon the grounds I have stated, she can get a decree for payment, and the executor will have nothing to do with it. If it should be necessary to carry on the suit of *King* v. *Engelback*, I do not know enough of the suit to say what ought to be done with regard to it, but I know and I can see enough upon the undisputed allegations in the bill to say that that suit will not do justice or settle the question which the Plaintiff raises, and that there can be no decision in that suit upon the point which is tendered to the Court by this bill.

I am of opinion, therefore, that the demurrer must be overruled.

Solicitors for the Plaintiff: Messrs. *Stevens & King.*
Solicitor for the Defendant *Engelback:* Mr. *T. H. Devonshire.*

V.-C. B. 1871 *April* 26.

KNAPP *v.* KNAPP.

Power of charging Portions—Prospective Exercise of Power—Death of Child—Further Exercise of Power—Number of Objects—Maintenance.

19 Ch D 502

Tenant for life of real estates, being empowered by the settlement to charge by deed or will for portions for younger children of his, by any woman he might marry, any sum not exceeding, if there should be but one such child or two such children, and no more, £3000; if three, and no more, £4000; and if four or more, £5000, "to vest in, be paid to, or divided amongst the child or children respectively for whom the same respectively shall and may be charged, or to or among him, her, them, and his, her, or their respective issue," at such ages or times, "with such maintenance meanwhile," as he should appoint—by his marriage settlement, dated in 1829, in exercise of the power, charged the estates with the payment for younger children of the marriage, if there should be but one such child, or two children, and no more, of £3000; if three, and no more, of £4000; and if four or more, of £5000, "to vest in and be paid to such children respectively, or in and to any one or more of them" exclusively, at such ages or times, in such shares

and proportions, and with such yearly sums for maintenance "until their respective portions shall become payable," as he should by deed or will appoint; and in default of appointment, the sum so charged to be equally divided between and amongst such younger children, "to become a vested interest in such of them as," being sons, should attain twenty-one, or, being daughters, should attain twenty-one or marry, which should first happen. If any younger child should die under twenty-one, or, being a daughter, without being married, then the portion of such child, original and accruing, was to accrue and belong to the survivors or survivor, others or other of the younger children.

There were issue of the marriage three daughters and two sons. One daughter died under twenty-one, and unmarried; and a second died leaving issue. After the death of both, the husband (having survived the wife) appointed £5000, as to £2500 for the surviving daughter, as to £2000 for one of the sons, and as to £500 for the two infant children (of whom one had since died) of the deceased daughter:—

Held, that, in the events that had happened, the whole sum of £5000 had become appointable under the power; and that the interest of the £500 was applicable for the benefit of the grandchild during her minority.

BY indenture of lease and release, dated respectively the 1st and 2nd of May, 1829, and by a common recovery suffered in pursuance thereof, certain real estates were assured and limited, after certain uses unnecessary to state, to the use of *Matthew Knapp* and his assigns for life, with remainder to his first son in tail male, with divers remainders over; and the indenture contained the following proviso:—

"Provided also . . . that it shall be lawful for the said *Matthew Knapp*, at any time or times hereafter, either before or after his marriage with any woman or women," by deed or will "to subject and charge all or any part of the said manors and other hereditaments to and with the payment as and for a portion or portions for any child or children of the said *Matthew Knapp* lawfully to be begotten on the body or bodies of such woman or women respectively, exclusively of an eldest or only son for the time being entitled in possession, or in remainder expectant on the decease of the survivor of *Primatt Knapp*" (father of *Matthew Knapp*) "and *Matthew Knapp*, to the aforesaid manors and other hereditaments, of any sum or sums of money not exceeding in the whole the sum or respective sums following (that is to say); if there shall be but one such child or two such children, and no more, the sum of £3000; if there shall be three such children,

V.-C. B. 1871 KNAPP v. KNAPP.

and no more, the sum of £4000; and if four or more such children, the sum of £5000; the sum or sums of money so to be charged to vest in and be paid to or divided amongst the child or children respectively for whom the same respectively shall or may be charged, or to or among him, her, or them, and his, her, or their respective issue, at such age or time, ages or times, with such maintenance meanwhile, and if more than one, in such shares and proportions" as *Matthew Knapp* should by deed or will appoint; "and also to limit and appoint the said manors and other hereditaments, or such part or parts thereof which shall be so charged, as last hereinbefore mentioned, to any person or persons for any term or terms of years, with or without impeachment of waste, upon trust, by way of mortgage or otherwise, to raise the money to be charged, or such portion or portions and maintenance as aforesaid . . ."

By an indenture dated the 22nd of August, 1829, being the marriage settlement of *Matthew Knapp* and *Anna Edwyn* his wife, *Matthew Knapp* charged all the premises comprised in the last mentioned indenture in manner following, that is to say:—

"To and with the payment, in case there shall be one or more child or children of the said *Matthew Knapp* lawfully to be begotten on the body of the said *Anna Edwyn* his wife other than and besides an eldest or only son, or in case there shall be no son of the said *Matthew Knapp* lawfully to be begotten on the body of the said *Anna Edwyn* his wife, but one or more daughter or daughters, of the sum or sums hereinafter mentioned as and for a portion or portions of such child or children of the said *Matthew Knapp* lawfully to be begotten on the body of the said *Anna Edwyn* his wife, exclusively of an eldest or only son for the time being entitled in possession or in remainder expectant on the decease of the survivor of the said *Primatt Knapp* and *Matthew Knapp*, to the aforesaid manors and hereditaments, or of such daughter or daughters only (as the case may be); that is to say, if there shall be but one such child, or two such children and no more, the sum of £3000; if there shall be three such children, and no more, the sum of £4000; and if four or more such children, the sum of £5000; to vest in and be paid to such children respectively, or in and to any one or more of them to the exclusion of the other

or others of them, or in or to his, her, or their issue, at such age or time, ages or times, and in such shares and proportions, and with such yearly sum or sums for the maintenance and support of such child or children until their respective portions shall become payable," as *Matthew Knapp* by deed or will "shall direct or appoint; and in default of such direction or appointment, then the sum so charged as a portion or portions for the younger children, or daughters, as the case may be, of the said *Matthew Knapp* by the said *Anna Edwyn* his wife, to be equally divided between and amongst such younger children or daughters, and to become a vested interest in such of them as shall be a son or sons at his or their age or respective ages of twenty-one years; and in such of them as shall be a daughter or daughters at the same age, or upon her or their marriage or respective marriages, which shall first happen, and be payable to them respectively at the same age or time, if the said *Primatt Knapp*, the father, and *Matthew Knapp* shall both be then dead, and two years shall have elapsed after the decease of the survivor of them, but otherwise not until the expiration of two years after the decease of such survivor; but the said portion or portions shall nevertheless carry interest in the meantime from the death of such survivor until payment thereof, at the rate of £5 per cent. per annum. And in case there shall be more than one younger child or more than one daughter of the said *Matthew Knapp* by the said *Anna Edwyn* his wife, and any of them, being a son or sons, shall depart this life, or become an eldest or only son before he or they respectively shall attain the age of twenty-one years, or, being a daughter or daughters, shall die under that age without having been married, then and in such case the portion or share of every such son so dying or becoming an eldest or only son, and of every daughter so dying under the age of twenty-one years without having been married, and also such other portions or shares as from time to time shall or may presumptively belong to the same child or children so dying as aforesaid, by accruer or survivorship under this present provision, shall accrue and belong to the survivors or survivor, or others or other of such children (not being an eldest or only son), and be payable and paid to him, her, or them respectively at the same ages, days, and times as his, her, or their original share or shares of or in the said sum or sums;"

V.-C. B. 1871 KNAPP v. KNAPP.

and for more effectually securing "the said" portions, *Matthew Knapp* granted and appointed unto two trustees all the premises comprised in the indenture from and after the decease of *Primatt Knapp* and himself for a term of 1200 years, upon usual trusts, by mortgage, demise, or sale, to levy and raise "the money thereinbefore charged for such portion or portions and maintenance as aforesaid, and thereupon pay, apply, and dispose of the same" accordingly.

Anna Edwyn, the wife of *Matthew Knapp*, died in 1836. There were issue of the marriage five children, namely, *Anna Mary Ann Knapp*, *Selina Brown Knapp*, who married *William Adkin Rogers*, *Matthew Grenville Samwell Knapp*, *Beaumont Orlando Primatt Knapp*, and *Anna Frances Knapp*.

Selina Brown Rogers died in November, 1854, leaving issue two children.

Anna Frances Knapp died an infant, and unmarried, some time before the date of the next mentioned deed.

By a deed-poll, dated the 7th of April, 1856, *Matthew Knapp*, in exercise of the above power, directed and appointed that the trustees should, from and after his decease, stand possessed of or interested in the sum of £5000 charged upon the hereditaments comprised in the indenture of the 22nd of August, 1829, upon trust, as to one moiety, for *Anna Mary Ann Knapp*, and as to another moiety, upon trust, as to £2000, part thereof, for *Beaumont O. P. Knapp*, and as to £500, the remainder thereof, for the two children of the late *Selina Brown Rogers*, equally, share and share alike; but if either of such children should die under twenty-one, then for such surviving child only.

Shortly after the 7th of April, 1856, *Anna Mary Ann Knapp* married the Rev. *Septimus Rolleston*.

In October, 1859, one of the infant children of *Selina B. Rogers* died, leaving the other, a daughter named *Gertrude*, surviving.

Matthew Knapp, the appointor, survived his father and died on the 18th of October, 1867.

This bill was filed on the 28th of February, 1870, by the trustees of Mrs. *Rolleston's* marriage settlement, against *Matthew G. S. Knapp*, the tenant for life in possession, *John Matthew Knapp*, an infant, the next tenant in tail in remainder, *Gertrude Rogers*,

Beaumont O. P. Knapp, certain incumbrancers, and the devisees of the surviving trustee of the portions term, stating the above facts, and some subsequent dealings with the appointed portions; and stating that a question had been raised whether, in the above events, *Matthew Knapp* had, at the date of the deed-poll, any power to appoint more than £4000 to or among his younger children or issue; and that another question was, whether the £500, or such other sum (if any) as *Gertrude Rogers* was entitled to under the deed-poll as the survivor of the two children of *Selina B. Rogers*, deceased, could be properly raised during her minority; and whether the interest or income of the same sum, when raised, was properly applicable for her maintenance and education during her minority.

The bill prayed that new trustees might be appointed of the portions term, and consequential directions; for a declaration that by the deed of the 22nd of August, 1829, and the deed-poll of the 7th of April, 1856, there was a valid execution of the power of charging portions contained in the deed of the 2nd of May, 1829; and that the whole of the £5000 was now raiseable; and that the trustees might be at liberty to apply the interest of the £500 for the maintenance and education of the Defendant *Gertrude Rogers* during her minority.

Mr. *Kay*, Q.C., and Mr. *C. Hall*, for the Plaintiffs:—

That the whole sum of £5000 is appointable, in the events that have happened, appears from *Hemming* v. *Griffith* (1) and *Alexander* v. *Alexander* (2).

The appointment to the children of Mrs. *Rogers* is good, inasmuch as the power included not only children, but their issue; nor is there anything to invalidate the exercise of the power in giving a right of survivorship between the two grandchildren in the event of the death of either of them under twenty-one: *Sugden* on Powers (3).

That the £5000 is now raiseable, notwithstanding the infancy of the grandchildren, appears from *Gillibrand* v. *Goold* (4).

Mr. *Peck*, for infants in the same interest.

(1) 2 Giff. 403.
(2) Tudor's L. C., 2nd Ed. 330.
(3) 8th Ed. 681; c. 16, s. 2, pl. 2.
(4) 5 Sim. 149.

V.-C. B. 1871 KNAPP v. KNAPP.

Mr. *C. H. Turner*, for the tenant for life and infant tenant in tail:—

At the date of the second appointment, Mrs. *Knapp* being dead, no more objects of the appointment could possibly come into existence.

At this time there were three living children, and issue of a fourth; that is to say, only two younger children and the issue of a deceased younger child; so that there were only three persons who, or whose issue, could have taken if there had been no appointment.

Under these circumstances it is submitted that only £4000 was raiseable. Had the power contained the words "with the payment for any child or children who, being a son or sons, shall attain twenty-one, or, being a daughter or daughters, shall attain twenty-one, or be married under that age," the matter would have been beyond all doubt. Although these words are not present, the true construction of the settlement, on the whole, is, that, in the events which had happened when the appointment was made, there were only two younger children, and the issue of a third, that is, only three younger children within the meaning of the power. Otherwise, if the power had been to appoint £1000 for each younger child, and twenty had been born, then, if nineteen had died, the survivor would have taken £20,000.

The trustees cannot apply the interest of a share which does not vest till the grandchild attains twenty-one or is married.

Mr. *Vincent*, for the executors of the last surviving trustee.

SIR JAMES BACON, V.C.:—

I am much obliged to you, Mr. *Turner*, for your argument, and I am very glad the matter has not been disposed of without argument. I cannot entertain the slightest doubt about the right of the Plaintiffs as it is pleaded. Your argument would be to construe the power by events which have happened subsequently to the creation of the power.

The power, as I read it, is originally a power to charge without regard to any events which should happen, except only the event of certain numbers of children coming into existence. The moment

this event happens the power is in its full vigour, and that power cannot be limited, controlled, or questioned in any degree, on the ground that under different states of circumstances different results would be arrived at—not even in the extreme case which you have put of twenty children being born, and each having £1000, and so eating up the whole estate. If that were to happen, it could only be in consequence of the conveyance having been improvidently drawn, and due provision not having been made for events which, in the nature of things, might happen. It could not alter the force and vigour of the power itself. Here the power, as plainly as words can make it, is a power, in the events which have happened, to charge upon the estates in question a fixed sum, and that is all that has been done. Added to that is a power to appoint. That power has been exercised, and not exceeded. I see no reason arising either out of the particulars of the case (which do not influence my judgment) or generally, why the claim now made by the appointees should not prevail according to the precise tenor of the instrument by which the appointment is made.

There will be a declaration that the £5000 was well charged and duly appointed by the several deeds in the bill mentioned, and an order that the trustees be at liberty to apply the income of the £500 for the maintenance of the infant child of Mrs. *Rogers* during her minority.

Solicitors for the Plaintiffs and some Defendants: Messrs. *Iliffe, Russell, & Iliffe,* agents for Mr. *J. Parrott, Stony Stratford.*

Solicitors for other Defendants: Messrs. *Bell & Newman.*

V.-C. B.
1871
May 30, 31.

In re BONELLI'S TELEGRAPH COMPANY.

COLLIE'S CLAIM.

Company — Agreement of Directors to remunerate Agent — Informal Letter of Directors—Powers of Directors not acting at a Board Meeting—Liability of Company.

25 L.D 121
120

By the articles of association of a telegraph company it was provided that three directors should be the quorum necessary for the transaction of business; and the directors were empowered, in their discretion, to sell all or any one or more of the company's lines of telegraph, grants, licenses, powers, ways, way-leases, easements, privileges, engagements, or contracts, or any part of its goodwill, estate, property, or interest therein, upon such terms and conditions as they should deem expedient; and also at their discretion to appoint agents; any such agent to be remunerated at the discretion of the directors.

The company resolved to sell their undertaking to the Postmaster-General; and in July, 1869, a letter was written addressed to *C.*, appointing him to act as agent for the directors in the matter of the sale, and agreeing that if he succeeded in obtaining from the Postmaster-General the sum of £20,000 or upwards, his commission should be £25 per cent. The letter concluded by saying: "We engage to sign a legal obligation to the above effect, when called upon, and to get the signatures of our brother directors." This letter was written in *C.'s* office, and there signed by two of the directors and handed to *C.*, who forwarded it to a third director in the country, by whom it was returned to *C.* confirmed and signed by himself and a fourth director. This agreement, though not appearing to have been resolved upon or confirmed at any meeting of directors, was referred to at a subsequent meeting of shareholders, and not repudiated; but no such legal obligation as referred to in the letter was executed. The sale having been effected through *C.'s* agency for a sum of more than £20,000:—

Held, that the agreement was not *ultrà vires*; and that though informal according to the internal regulations of the company, it was binding against the company in favour of a person dealing with them; consequently, that *C.* was entitled to commission at the rate of 25 per cent.

THIS was an adjourned summons on the part of *John William Maclure* and *William Joseph White*, the liquidators of *Bonelli's Electric Telegraph Company, Limited*, for the direction of the Court with reference to a claim by *Alexander Collie* against the assets of the company, and to adjudicate on Mr. *Collie's* claim to have a lien on an agreement dated the 1st of December, 1869, made between the company of the one part, and Her Majesty's Postmaster-General

of the other part; and also on the purchase-money of £22,500 mentioned in the agreement, as payable by the Postmaster-General to the company, and the claim of Mr. *Collie* to be paid thereout the sum of £5625 for commission in respect of the said agreement.

Bonelli's Company was incorporated under the Joint Stock Companies Acts, 1856, 1857, and the powers of the company were afterwards amended and enlarged by two Acts of Parliament, 24 & 25 Vict. c. 92, and 26 & 27 Vict. c. 212 (1).

(1) The articles of association bearing on the present claim were the following:—

Art. 104. "The objects, businesses, affairs, and concerns of this company, of what nature or kind soever, except such parts thereof as shall, by the hereinbefore recited Acts of Parliament, the *Telegraph Act*, 1863, the *Companies Act*, 1862, or by these presents, be specified as part of the duties of the company in meeting assembled, shall be entirely directed and governed by the directors of this company for the time being: Provided always, that nothing in this article contained shall take away, or be deemed or construed to take away, the power of the company in meeting assembled to regulate, control, supervise, abrogate, or annul, so far as such company legally may, any act, deed, or resolution of the directors."

Art. 109. "The continuing directors may legally act, and these acts shall be binding on the company, notwithstanding any casual or other vacancy in their body."

Art. 123. "Any director, or the company's secretary for the time being, may at any time, and from time to time, summon a meeting or meetings of the directors, by giving to each director twenty-four hours' notice of such meeting."

Art. 124. "Three directors shall be the quorum necessary for the transaction of business at any meeting of the directors."

Art. 125. "The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit. Questions arising at any meeting of directors shall be decided by a majority of votes, each director to have one vote; and in case of an equality of votes the chairman shall, in addition to his own vote, have a casting vote."

Art. 139. "The directors may in their discretion, and from time to time, sell, dispose of, or transfer, to any one or more persons, corporations, or companies whatsoever, all or any one or more of the company's lines of telegraph wires, grants, licenses, powers, ways, way-leases, easements, privileges, engagements, or contracts, or any part of its goodwill, estate, property, or interest therein, upon such terms and conditions as the said directors shall deem expedient."

Art. 145. "The directors may, and they are hereby authorized and empowered, from time to time, for the purposes of the company, and upon such terms and conditions as they may think fit, ... to pay and allow any debts or demands claimed from the company, and, upon any evidence which they shall think proper, to adjust, settle, compromise, and compound all debts, claims, demands, matters, and things, respecting the company, or the affairs or property thereof, by arbitration, reference, opinion of counsel, or in any other manner which they shall judge reason-

V.-C. B. 1871

In re Bonelli's Telegraph Company.

Collie's Claim.

From the affidavit of Mr. *Collie* in support of the claim the following facts appeared:—

The company was not successful; in the directors' report, dated the 10th of October, 1867, the following passage occurred:—"By the balance-sheet it will be seen that the debts of the company have been reduced to the sum of £4062 8s. 5*d*. This has been effected by the directors making payments in advance of all calls due on shares held by them. Since issuing the last report the

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able, and on any terms which they shall think proper. To sell, exchange, underlet, or otherwise dispose of any of the property of the company not hereinbefore specifically mentioned. . . . And also as to all other matters as to which these presents are silent, to transact and effectuate the same for and on behalf of the company, and as they in their discretion shall think best for the benefit and advantage thereof."

Art. 156. "The directors may, in order to fully and effectually perform the duties of their office, or to fulfil or execute any of the general or special powers conferred upon them by these presents, and they are hereby empowered, from time to time, at their discretion, to exercise all such of this company's powers as are contained in the hereinbefore recited Acts of Parliament, or in the *Telegraph Act*, 1863, or in the *Companies Act*, 1862, or in these articles (except only such of them as are therein declared to be exercised by the company only in meeting assembled); and also to make, do, and execute all such deeds, documents, matters and things whatsoever, and under the company's seal or otherwise, as may be considered by them to be expedient or requisite in that behalf."

Art. 163. "The directors may from time to time, at their discretion, appoint any person or persons to be the accredited agent or agents of the company in all or any of the three parts of the *United Kingdom*, or elsewhere; and to negotiate and transact business relative to the objects of the company, upon such terms as the directors may think fit, and may delegate to such agent or agents such powers as the directors shall think reasonable, and subject to such conditions, restrictions, and securities as the directors shall impose; and any such agent shall be remunerated, suspended, or removed from such agency, or deprived of such powers, at the discretion of the directors."

Art. 164. "The directors may from time to time, and at all times, appoint, employ, remunerate, revoke the appointments of, or dismiss, all such electrical or other engineers, experts, surveyors, valuers, brokers, agents, or other persons, as they may think necessary to advise upon, or consult with, as to the making, purchasing, surveying, examining, or reporting upon, any property, either of the company or any existing or contemplated line of telegraph, license, easement, or privilege, which may be offered to the company, or for the acquisition of which the directors may deem it expedient to treat. And the directors may allow and pay out of the company's funds to the persons so employed such fee, salary, wages, commission, compensation, or remuneration as the directors may deem reasonable."

directors have made various efforts to obtain additional capital to carry out the objects of the company, but without success." It appeared that the amount of calls thus paid in advance was £8358.

The report of the directors, dated the 5th of October, 1868, contained the following passage:—"By the balance-sheet it will be seen that the financial position is little changed since last year, the rumour of the intention of the Government to take the control of the telegraphs having prevented any action on the part of the directors. This intention has been carried into effect by the passing of the *Telegraph Act*, 1868. By the 7th clause of this Act it is provided, that if the Postmaster-General shall acquire any one undertaking, he shall, upon request in writing of any company possessing an undertaking incorporated by special Act of Parliament at the time of the passing of the Act, purchase the undertaking of such company upon terms to be settled, failing agreement, by arbitration. The Postmaster-General has purchased an undertaking under the provisions of the Act. The system about to be adopted by the Government, and the superior facilities it possesses, render it impossible for any company to compete successfully. The directors, therefore, propose to take advantage of the above-mentioned clause."

On the 15th of October, 1868, a special meeting of shareholders was held at *Manchester*, at which a special resolution was passed, which was afterwards confirmed, "that the direction be, and are hereby empowered, in the name of the company, to request the Postmaster-General, in writing, to purchase the undertaking of the company on the terms of the 7th clause of the *Telegraph Act*, 1868, and to settle by agreement with the Postmaster-General the terms of such purchase, or, failing agreement, to settle such terms by arbitration, as provided by the said clause."

Mr. *Collie* stated, from information and belief (and the statement was not denied), that in anticipation of the sale of the undertaking to the Postmaster-General the secretary to the company saw Mr. *Scudamore*, the secretary to the Post Office, and mentioned the sum of £5000 as the price at which the undertaking could probably be transferred to the Post Office: £5000 being rather more than sufficient to pay off the company's debts.

V.-C. B.
1871
In re Bonelli's Telegraph Company.
Collie's Claim.

In July, 1869, one of the directors applied to Mr. *Collie* to undertake the negotiation of the sale to the Post Office; and, on the 24th of that month the following letter was written in Mr. *Collie's* office, and there signed by two of the directors:—

"17, *Leadenhall Street, London,*
"July 24, 1869.

"*Alexander Collie,* Esq., *London.*

"Dear Sir,—As directors of the *Bonelli's Telegraph Company, Limited,* and with full power to act for our brother directors in the said company, we hereby agree to pay you commission on the gross amount you, through your agent, may obtain from the Postmaster-General for the sale to him of the said company on the following scale: If any sum under £10,000 is got, £10 per cent. will be allowed to you. If the sum got be from £10,000 to £15,000, your commission will be £15 per cent. If £15,000 to £20,000 be got, your commission will be £20 per cent.; and if £20,000 or upwards, your commission will be £25 per cent. For this commission you engage to use your best exertions, through your agent, to obtain a good price for the company, and you engage to do this free from any expense to the company. As the company possesses no money or funds, it is understood that you are to take all the risk of the expenses in connection with the sale. And we engage to sign a legal obligation to the above effect when called upon, and to get the signatures of our brother directors also to the same.

"Yours truly,
"*John W. Maclure.*
"*Wm. Hamilton,* jun."

After the letter had been thus signed, it was forwarded by Mr. *Collie* to *Manchester* in a letter addressed to *Charles Stewart,* Esq., a third director; and on the 26th of July, Mr. *Stewart* returned the letter to Mr. *Collie,* with the following postscript and signatures:—

"We confirm and agree to the above.

"*Albert Cooper.*
"*Manchester,* July 26, 1869. *Chas. Stewart.*"

Mr. *Cooper* was a fourth director, and in the letter to Mr. *Collie*

inclosing the above Mr. *Stewart* said, "I have seen Mr. *Cooper*, who gives his assent and signature; I do so also; and enclosed you will find a letter (from the directors to you), with said signatures attached. I telegraphed to you this morning to the effect that Mr. *Cooper* and I agreed, but that I had preferred that my terms had been accepted. However, I throw no obstruction in the way, and heartily wish for success."

It appeared that the terms originally agreed upon with Mr. *Stewart* were, that the scale of commission should be £20 per cent. and no more upon any sum paid by the Post Office amounting to £15,000 and upwards.

The engrossment of a deed, whereby the terms of the above agreement were to be formally carried out, was prepared, but no deed was ever executed.

Mr. *Collie* then entered into negotiations with the Post Office, the result of which was that the above-mentioned agreement of the 1st of December, 1869, was come to, whereby the Postmaster-General agreed to give the sum of £22,500 for the purchase of the undertaking.

A general meeting of the company was held at *Manchester* on Friday, the 21st of January, 1870, at which it was resolved that the undertaking of the company be sold to the Postmaster-General for the sum of £22,500; that the directors be authorized to affix the seal of the company to the agreement; that the secretary should be paid £600 in recognition of his past services, and inadequate salary; and that the present directors, and the representatives of two deceased directors, should receive £1500 as a recognition of their services.

Mr. *Collie* stated that previous to the passing of these resolutions the chairman stated to the meeting the terms of commission which had been agreed upon with him. Upon this some shareholders spoke, and made some objections to the amount of commission, but no motion was made or resolution passed on the subject.

On the 12th of February, 1870, an order was made for winding up the company.

In cross-examination Mr. *Collie* stated that no personal communications passed between himself and the Post Office in relation to

V.-C. B. 1871

In re Bonelli's Telegraph Company.

Collie's Claim.

the sale. The remuneration claimed by him was earned not only for the work done by the agent, but for the risk run by Mr. *Collie* personally; that risk being pecuniary, that is to say, outlay and expenditure. Mr. *Bompas*, Mr. *Collie's* solicitor, was the agent referred to in the letter of agreement.

By an order made in the matter, dated the 2nd of May, 1871, on the application of the liquidators it was ordered that the Postmaster-General be at liberty to pay to the liquidators the sum of £22,500, together with the sum of £500 in full of all claims on the part of the company against the Postmaster-General for interest, making together £23,000; and that upon such payment being made all proper parties should join in and execute to him a proper deed of conveyance or assignment of the undertaking; also that the liquidators should within seven days after the receipt by them of the said sum of £23,000 pay the sum of £6500 into Court to the credit of the matter, "The Account of *Alexander Collie's* Claim," subject to further order; and it was further ordered that the sum of £6500 should be invested, and the interest accumulated.

Mr. *Kay*, Q.C., and Mr. *Jackson*, for the claimant:—

The liquidators' objection is founded on this only, that the directors did not meet and pass a formal resolution in the board-room. Although the company have reaped the benefit of the services for which the commission was agreed to be given, the liquidators repudiate payment on the ground that the directors omitted to do something which, as between themselves only, they ought to have done.

But the company have by their acts "adopted and ratified" the contract within the meaning of Lord *Campbell's* judgment in *Reuter* v. *Electric Telegraph Company* (1). The contract was within the proper business of the company, and being so, if known to the directors, it is binding on the company. If informal, it is not so against Mr. *Collie*. Any matters which relate to the internal management of the company with reference to the agreements they enter into need not be looked into by the outside parties to those agreements, if the agreements are *ex facie* good. Here there

(1) 6 E. & B. 341, 348. 3 Jur. N.S. 1245.

is no evidence before the Court to shew that the directors did not formally meet after, or even before, the date of the agreement and regularly adopt it. Certain it is they all knew of it, and substantially approved it.

The contract was signed by persons "acting under the express or implied authority of the company," within sect. 37 of the *Companies Act*, 1867 (30 & 31 Vict. c. 131).

As to the presumption of law that directors have power to bind a company, we refer to *Totterdell* v. *Fareham Brick and Tile Company* (1); *Bargate* v. *Shortridge* (2); *In re Barned's Banking Company* (3); *In re County Life Assurance Company* (4); and *Agar* v. *Athenæum Life Assurance Society* (5).

The case of *D'Arcy* v. *Tamar Railway Company* (6) will be cited against Mr. *Collie's* claim. In that case an old debt was due from the company to the Plaintiff, who was their engineer. For this old debt they gave him a bond, upon which he sued them, and they pleaded *non est factum*, on the ground that the secretary, who affixed the seal, had no power to do so. Thus the question was only as to the remedy, whether the debt was by simple contract or by specialty; and *Bramwell*, B., in giving judgment, observed that the presumption always is that the seal to a company's bond has been properly affixed. But in that instance it had been shewn affirmatively that the seal was not properly affixed. In this case, the company is not a railway, but a trading company; and if in *D'Arcy* v. *Tamar Railway Company* the company had not been allowed to prove the truth of their plea, it is plain the result would have been otherwise.

[They also referred to *Lindley* on Partnership (7).]

Mr. *Fry*, Q.C., and Mr. *Kekewich*, for the liquidators:—

Mr. *Collie* is entitled to only a *quantum meruit* for his services. His only merit is that he selected and set to work a very able solicitor.

The agreement was *ultrà vires;* and there was no authority on the part of the directors to enter into it.

(1) Law Rep. 1 C. P. 674.
(2) 5 H. L. C. 297, 318.
(3) Law Rep. 3 Ch. 105.
(4) Law Rep. 5 Ch. 288.
(5) 3 C. B. (N.S.) 725.
(6) Law Rep. 2 Ex. 158.
(7) 2nd Ed. 251.

V.-C. B. 1871 *In re* Bonelli's Telegraph Company. Collie's Claim.

It has been said that there is no magic in four men meeting in a room. Then why was the machinery of board meetings contrived? Surely because it was believed that some advantage would arise from deliberation in common. The company are entitled to the collective wisdom of the three directors.

The articles provide (123) for the summoning of meetings by the directors or secretary, and it is provided (124) that three directors shall be the quorum necessary for the transaction of business. The directors are empowered (139) "in their discretion" to sell. But how are they to exercise their discretion? Surely only in the way recognised by the articles. The article does not contemplate a sale and handing over of the whole business of the concern. So the power to appoint agents (163) is discretionary, but the discretion is to be formally and regularly exercised.

Then, was this agreement made with sufficient regularity to bind the company? A stranger who takes documents which are *primâ facie* good is not put upon inquiry. But what did this letter say? "We engage to sign a legal obligation, and to get the signatures of our brother directors also." No legal obligation ever was signed by the directors; and as to the moral obligation, it is proportionate only to the amount of services, which in this case has been practically nothing. An agent who is content to rely on a letter without having it confirmed by the resolution of a board meeting, must take the consequences.

Lindley on Partnership (1) has been referred to; but in the Addenda to that work attention is called (2) to the case of *D'Arcy* v. *Tamar Railway Company* (3), which materially alters previous conceptions of what the law is on these matters.

In *Reuter* v. *Electric Telegraph Company* (4) the agreement, which was by parol with the chairman alone, was held to have been ratified by the acts of the company, amongst which was an actual payment of money to the claimant.

The matter is not carried further by the *Companies Act*, 1867, which, moreover, only applies to companies incorporated by registration under the Act of 1862.

The other cases cited may be distinguished.

(1) Page 251.
(2) Page lxxx.
(3) Law Rep. 2 Ex. 158.
(4) 6 E. & B. 341.

Sir James Bacon, V.C.:—

This is certainly a very singular case. The circumstances are not in dispute. It is not in dispute that *Bonelli's Telegraph Company* were in a state of ruin and insolvency. The directors, whatever their powers were, were to manage the affairs of the company in general terms; and they had to manage such affairs as I have described—affairs which appear to have been in utter ruin and insolvency.

The *Telegraph Act* having been passed, an opportunity or a chance presented itself that, by selling to the Government, they could get back some of their capital, and provide some means for paying their debts, which were burdensome. Then an accident presented to them Mr. *Collie*. They were prepared to sell for £5000, and would, for anything that appears, have been very glad to get it. Then Mr. *Collie*, being—no matter by what means—introduced to their notice and acquaintance, suggests that he can make a better bargain for them. They very readily agree to accept his services. They, in very distinct terms, agree what shall be the remuneration paid to him if he does make a better bargain. His reward to be proportionate to the amount he obtains. The matter goes on upon that footing; and after the introduction of Mr. *Collie*—as he says, by his means—as is suggested on the other side, not by his means, but by some other means, though of that there is no evidence—at all events, after Mr. *Collie* has taken the matter in hand, the negotiations with the Postmaster-General proceed to a termination, and he procures for this company, which had a very indistinct prospect of getting £5000, £22,500 for the purchase of all their assets and estate in the world, and they have received the money.

The question for the Court simply is, whether Mr. *Collie*, having thus exerted himself, and upon the terms specified in a certain agreement which is referred to, is entitled to have that which the directors agreed to give him if he succeeded. The official liquidators say that, in the discharge of their duty to the shareholders (creditors are out of the question, for there is enough to pay them over and over again), they are bound to resist this claim, and they have been advised that by law they can resist it; and in that shape the question comes before the Court. It is admitted by the official liquidators that Mr. *Collie*, whose services to some extent are

V.-C. B. 1871

In re Bonelli's Telegraph Company.

Collie's Claim.

acknowledged—not to the extent to which he puts it upon his agreement, but to some extent—may be entitled, and is entitled, to a *quantum meruit* for all that he has done for the company; and so much, with an affectation of great liberality, the official liquidators are willing to concede to him. But that is purely gratuitous liberality on their part, for they have argued the case at the Bar as if there was no validity whatever in the agreement, and as if there was no claim that could be legally enforced against the company. If that is so, I do not know that it is any part of the official liquidators' duty to give away the company's money on any notion of generosity which they may entertain; but, however, that is the way they have stated it, and they have admitted that to a *quantum meruit* at least — or at most, as they say— Mr. *Collie* is entitled.

The first question argued is, that the agreement in question is *ultrà vires*—that the directors had no right whatever to enter into any such agreement. The articles have been referred to; they are very distinct and clear in their expression, and in their operation and meaning. I will not refer to them in detail, because it is unnecessary, as they have been read many times during the argument; but I refer particularly to Articles 104, 139, 145, 156, 163, and 164, which present this state of circumstances: the directors have the entire power over all the affairs of the company, except only such as are specially excepted, and upon which no question now turns; they are at liberty to buy, to lease, or sell, all or any part of the estate, assets, interests, and effects of the company, in terms as wide as can well be conceived, at their mere discretion. That it might be found expedient to sell the company, block and stock, cannot be doubted upon reading the articles of association. So to sell it was one of the powers delegated to the discretion of the directors. The directors, if it had been a flourishing company, might have exercised this power; and that they not only might, but ought to exercise this power, is abundantly clear when the circumstances of the company are taken into consideration.

But it does not rest there. If there had been any doubt—and I entertain no doubt whatever—about the authority of the directors under the articles of association, it would be entirely removed by what took place in October, 1868. The report which is then

made by the directors of the company is worth looking at. They shew, by the balance-sheet, that the financial position of the company is little changed, the rumour of the intention of the Government to take the control of the telegraphs having prevented any proceeding on the part of the directors, who had before tried to increase their capital, and had failed to do so. They can not go on without an increased capital, and they excuse themselves for having done nothing since their last report by mentioning the rumour of the intention of the Government to take the telegraphs. They go on to say that that intention has been carried into effect; and they quote the 7th clause of the *Telegraph Act*, 1868. Then the report says: "The system about to be adopted by the Government, and the superior facilities it possesses, render it impossible for any company to compete successfully; the directors, therefore, propose to take advantage of the above-mentioned clause." So that, in addition to the embarrassment occasioned by what they call their financial position—which means insolvency—there was this other, that they were to have rivals in the shape of the Government, against whom by no kind of competition could the existing company hope to succeed.

Then at a meeting in October, 1868, made special for this express purpose, a resolution was proposed for adoption and confirmation at a subsequent special meeting, and the shareholders were requested to attend in the usual way. The resolution proposed, and which was ultimately carried, was: "That the directors be and are hereby empowered in the name of the company to request the Postmaster-General, in writing, to purchase the undertaking of the company on the terms of the 7th clause of the *Telegraph Act*, 1868, and to settle by agreement with the Postmaster-General the terms of such purchase; or, failing agreement, to settle such terms by arbitration, "as provided by the clause." Now, if there were, as I have said, any doubt as to the powers in the directors to enter into a contract under the *Telegraph Act* with the Postmaster-General, that doubt must be wholly removed by the terms of this resolution. Nothing can be wider in its operation than the words which are here used, "to request the Postmaster-General to purchase," and "to settle by agreement the terms of such purchase." That is in October, 1868.

V.-C. B. 1871 — *In re* Bonelli's Telegraph Company. — Collie's Claim.

Then, armed with those powers conferred by the resolution, in addition to the powers which they had under the articles, the directors, I suppose, did something. What they did does not very clearly appear, but they came into contact with Mr. *Collie*. Now, is there any general ground for saying that the directors are not empowered, either by the resolution or under the articles, or by both together, to sell out and out, on the best terms that they can make with the Postmaster-General, everything that belonged to this company? In my opinion, there is no such doubt. Then, if they are empowered to sell by this resolution, where are any of the powers contained in the articles taken away from them or abridged? In order to effect that resolution, they must have all the powers which the articles confer upon them, and with these combined powers the arrangement with Mr. *Collie* is entered into. Then the argument of *ultrà vires*, in my opinion, has no place whatever in the case. The authority and the right of the directors to do this thing cannot be questioned.

Then it is said that the formal authority to enter into the agreement was wanting, for that the article providing that the acts of directors shall be binding means that they shall act in their "combined wisdom;" and that nothing shall be valid that is not done by three of them together.

Now, first of all, there is no such thing said in the articles. I quite agree that the "combined wisdom" is required in this sense, that they must all be of one mind. But I do not know that it is necessary they shall all meet in one place. I can conceive a great many circumstances, which I do not say happened in this case, but which may happen in any case, where the actual presence of the three directors cannot be procured, but where their combination can be most effectually secured by correspondence, by transmission of messages, or by other means which may be resorted to. If you are satisfied that the persons whose concurrence is necessary to give validity to the act did so concur, with full knowledge of all that they were doing, in my opinion the terms of the law are fully satisfied, and it is not necessary that whatever is done by directors should be done under some roof, in some place, where they are all three assembled.

That is really the only objection that has been taken on this

part of the case. It is said that two of these gentlemen were in *London* when the terms of the agreement providing for Mr. *Collie's* remuneration were settled as between them and him; that they were communicated to the other gentleman at *Manchester*, who was not a stranger to the subject, as it appears. It had been the subject of previous consideration, negotiation, and discussion at least. It is communicated to him; and, with some reluctance it is true—no other reluctance than that which every man who may be in a minority may be said to feel—Mr. *Stewart* gives up the objection that he once had, and concurs completely and absolutely in the agreement which his two colleagues in *London* had already come to. Then it is said that this is contrary to the law. Many cases were referred to upon the general proposition, that where an agreement has been entered into for the benefit of a company, although everything required may not have been strictly pursued, if the company has had the benefit of it, they are bound by it. Other cases have been referred to, where it was held that a person dealing with a company is not bound to see that every formality prescribed by the articles has been actually performed, but that all things have been rightly done when the person dealing with the company has no notice that they have not been rightly done. Those cases establish principles which nobody would now think of questioning.

But the case of *D'Arcy* v. *Tamar Railway Company* (1) was referred to by the other side somewhat triumphantly, if I may so say, for the purpose of shewing that an agreement or a contract made by a company, not in the form prescribed by the rules, is not binding upon the company. In my opinion it proves no such thing. The rules are made obviously and intentionally to protect the company against frauds or malpractices, or excess of that authority which they delegate to the directors. It is for their protection alone that these rules are established. If in any case it is shewn that the company is prejudiced by the infraction, violation, or neglect of these rules, there arises a case in which the company may say, "We are not bound by this transaction," and submit that question to the Court. But the case of *D'Arcy* v. *Tamar Railway Company* was of a totally different kind. It is a common law case,

(1) Law Rep. 2 Ex. 158.

V.-C. B. 1871

In re Bonelli's Telegraph Company.

Collie's Claim.

decided upon common law pleadings. There the action was an action of debt upon a bond under the seal of the company, the plea was *non est factum*, and under that plea it was, of course, competent to the company to prove the truth of the plea. They did prove it conclusively. There could be no valid bond in that case unless the seal of the company was affixed to it; and the seal appeared to be so affixed. The seal could not be lawfully affixed but by the direction of the three directors; and it was proved beyond question that the seal had been affixed when only two directors, and not three, had given any kind of authority for it. The authority of the third was obtained at a later period, and upon the plainest principles of common law pleading there could be only one way of dealing with the case. It is true that the judges in *D'Arcy* v. *Tamar Railway Company* (1) did, though not necessarily for the purpose of decision, say that what the law required was, that there should be the combined action of at least three directors before the seal could be affixed to a bond. Similar expressions have been made use of in this argument for the purpose of insisting that unless the three directors were actually present bodily, conferring together, and concurring in a resolution, there was no authority to enter into the agreement. I cannot think that that is so. I find the "combined wisdom" applied to the agreement; I find the concurrence of the three directors; I find that neither then nor now do they or either of them express any doubt upon that subject. They have not been examined, and the fact remains therefore, I think, distinctly proved, that they did concur in this agreement; that they did, by their combined deliberations give full validity to it; and I have said that I think that they had power to enter into an agreement to sell under the resolution as they had under the rules.

Well, then, it is said that the *quantum meruit* is open to question; and if I had heard any evidence upon that subject, I should know better how to deal with it than I do at present; because beyond the mere insinuation—the mere suggestion that it is Mr. *Bompas* who is entitled to the reward, and not Mr. *Collie* (for which I can find no ground whatever), I have heard nothing to impeach the amount of *quantum meruit* as it appears in the agreement. Mr.

(1) Law Rep. 2 Ex. 158.

Collie was, of course, not expected to act by himself. It seems he selected a gentleman who had attained a certain celebrity from his negotiations with the Postmaster-General. As Mr. *Jackson* told us, the moment Mr. *Bompas* presented himself, all Mr. *Scudamore's* objections and doubts were removed, and he at once yielded to the demand made upon him. How could Mr. *Collie* act without employing some other person? Mr. *Collie's* case is, that he employed, not only that agent, but many others, at very considerable cost. The amount of his expenditure is not suggested, there is only a general statement. If I am asked to deal with this question of *quantum meruit*, I must approach it as it would be approached by a jury who had to decide it. Then what would a jury have to consider? It would be said by the counsel for the claimant, "This is a case of salvage; this is a case in which, the ship being in the utmost danger, by the exertions of this salvor the ship and tackle and freight and cargo are saved; the ship is brought into port, and the cargo sold advantageously; all that was danger turns out to be pure and unmixed prosperity; and all this has been done by the exertions of this man." Well then, if I were to look to the agreement on the question of *quantum meruit*, I cannot think that the sum he claims is an unreasonable one; I could not say, if he were the salvor of a ship at sea, that it would be an unreasonable one. But I am not driven to any such guessing about it as a jury would be. I find that, by a valid, binding agreement, the amount of compensation was plainly and distinctly fixed, and reasonably and properly fixed, considering the speculative nature of the engagement, and that it points out exactly what amount the salvor is to receive. Looking at it, therefore, whether as an agreement binding in its terms respecting the 25 per cent., or treating it only as a case of *quantum meruit*, the amount of which I am to find out for myself, I have not the slightest difficulty in coming to the conclusion that this gentleman is entitled, in all justice, reason, and fairness, to the full amount which he claims under his agreement, and that the liquidators are bound to admit that claim.

The costs of the liquidators must be allowed out of the estate.

Mr. *Jackson* submitted that as the Postmaster-General had paid

V.-C. B. 1871 *In re* Bonelli's Telegraph Company. — Collie's Claim.

interest on the £22,500, the claimant was entitled to his proportion of such interest.

Mr. *Fry* objected.

Sir James Bacon, V.C.:—

The claimant is entitled to a fourth part of the interest on the sum which but for you he would have received; and which interest he might have made.

I omitted to observe upon the resolution of the meeting, when—the shareholders being assembled, and having to deal with this £22,500—although the question of Mr. *Collie's* remuneration seems to have been touched, it was but very slightly alluded to, and seems to have made no impression. There was then an opportunity of disputing the resolution, if anybody had been disposed to do so; but nobody did dispute it; and not only did nobody dispute it, but the meeting were so exuberant in their rejoicings at the successful result to which Mr. *Collie's* exertions had arrived, that they paid their secretary, I dare say, not more than he ought to have received; and distributed amongst the directors, dead and alive, the sum of £1500.

Solicitors for the Liquidators: Messrs. *Mackenzie, Trinder, & Co.*
Solicitors for the Claimant: Messrs. *Bischoff, Bompas, & Bischoff.*

V.-C. B. 1871 *June* 1.

ATTORNEY-GENERAL *v.* CORPORATION OF HALIFAX.

Practice—Information—Costs.

1. The costs of proceedings before the Attorney-General, for the purpose of obtaining his *fiat* for the filing of an information, rendered necessary by the opposition (unsuccessfully) raised by the Defendants, are costs of the cause payable by Defendants under a decree directing payment to Plaintiffs of their costs of the suit and of the information.

2. Pending their appeal from a decree against them in a suit by information and bill, the Defendants, with the view of influencing the result of the appeal, presented a memorial praying the Attorney-General to withdaw his *fiat*. The Plaintiffs presented a counter-memorial, and on hearing both parties, the Attorney-General refused to withdraw his *fiat*. Defendants subsequently obtained leave to withdraw their appeal on payment to Plaintiffs of

such costs as Plaintiffs would have been entitled to receive if the appeal had been dismissed with costs:—

Held, that the costs of the proceedings before the Attorney-General, pending the appeal, were costs in the cause payable by the Defendants.

THIS was an adjourned summons on behalf of the Informant and Plaintiffs for a reference back to the Taxing Master to review his taxation of the Informant and Plaintiffs' bills of costs, disallowing the following particulars:—

(1) The costs, charges, and expenses of the Informant and Plaintiffs incurred of and in relation to the obtaining from the Attorney-General his *fiat* for the filing of the information; and (2) the costs, charges, and expenses of and incident to the application by memorial of the Defendants to the Attorney-General to withdraw his *fiat* in the matter of the information, and the subsequent hearing of the memorial and counter-memorial of the Informant and Plaintiffs by the Attorney-General.

The information and bill were filed on the 15th of May, 1869, for the purpose of restraining the Defendants, the *Corporation of Halifax*, from pouring the sewage of the borough into the *Hebble Brook*, which flows past the property of the Plaintiffs, so as to cause a public nuisance to the inhabitants of the district, and a private injury to the Plaintiffs as riparian owners.

A copy of the draft bill and information was lodged with the Attorney-General on the 26th of April, 1869, and referred in the usual course to the solicitors of the Attorney-General. On the 7th of May a memorial was presented by the town clerk of *Halifax*, praying the Attorney-General to withhold his *fiat*.

The matter was fully investigated before the Attorney-General and his equity counsel upon the question of public nuisance, and after hearing the town clerk and counsel for the Plaintiffs, and reading the certificated reports, statements, and memorials of the inhabitants, the Attorney-General granted his *fiat*.

On the 8th of July, 1869, upon the cause coming on to be heard, Vice-Chancellor *James* made a decree restraining the Defendants from causing or permitting any new outfall into the *Hebble Brook*, and from and after the 1st of June, 1870, from causing or permitting the sewage of the borough to pass into the brook unless and until the same should be sufficiently purified and deodorised;

V.-C. B. 1871

ATTORNEY-GENERAL v. CORPORATION OF HALIFAX.

"and it is ordered that the Defendants do pay to the Plaintiffs their costs of this suit and of the information, to be taxed by the Taxing Master."

The Defendants presented a petition of appeal against this decree, and, pending the appeal, the town clerk of *Halifax* presented another memorial to the Attorney-General, stating: "A Petition for rehearing has been presented, which it is confidently expected will be successful in removing the immediate restraint, especially if you hold the opinion that your functions as informant are no longer needed," and praying that he would be pleased to direct the withdrawal of the *fiat*.

On the 19th of November, 1869, the Attorney-General gave the Plaintiffs notice of the memorial, with an appointment to hear both the Plaintiffs and Defendants upon it. On the 26th of November the Plaintiffs presented a counter-memorial, submitting that the memorial of the Defendants was an attempt to obtain a rehearing of the case before the Attorney-General, that it was a course altogether without precedent, and would throw considerable additional expense upon the relators. It was also submitted that as the Attorney-General had no jurisdiction to make any adverse order as to costs on the corporation, even should he come to the conclusion not to interfere on their behalf, the corporation, as a preliminary to any hearing of the case before the Attorney-General, should enter into such binding contract as could be legally enforced to pay to the relators all the costs and expenses of and incidental to or caused by the application, whatever might be its result.

The Attorney-General was attended by counsel on both sides on the 30th of November, 1869, and, after hearing the arguments, he stated that it was quite clear to him that he could not accede to the application of the Defendants. On the question of the costs of the application being mentioned to him, the Attorney-General said that he had no power, and that the Court must deal with them.

The Defendants subsequently obtained leave, upon motion, to withdraw their petition of appeal upon the terms of paying to the Plaintiffs such costs as the Plaintiffs would have been entitled to receive from the Defendants if the Petition of appeal had been on the day of the hearing dismissed with costs, and also the costs of the motion. (1)

(1) See report 12 5 Ch 116 Ec 119

In taxing the costs of the information and suit as between party and party, the Taxing Master had disallowed all the items relating to the proceedings before the Attorney-General prior to his giving his *fiat* to the information, "such proceedings being in the nature of a distinct hearing before the Attorney-General and not costs of suit, according to the usual practice on filing an information and bill," and simply allowed a fee of £100 for preparing the information. The Taxing Master had also disallowed, under the order of the 6th of December, 1869, the costs incurred by the Informant and Plaintiffs in relation to the memorial presented to the Attorney-General by the Defendants, praying him to withdraw from the suit, "and which memorial led to considerable costs of both parties, and as to which proceedings the Attorney-General had no jurisdiction to allow costs to the Plaintiffs, who successfully resisted the application. I disallowed all these costs as not coming within the scope of this order, such proceedings not being costs in the cause nor of the appeal." The Taxing Master had also disallowed other items referred to in the summons, but the argument was confined to the costs of obtaining the *fiat*, and of opposing the memorial presented by the Defendants pending their appeal.

Mr. *Kay*, Q.C., and Mr. *Ince*, in support of the summons:—

The costs occasioned by the proceedings before the Attorney-General previous to the granting of the *fiat* are costs of the information, and, according to the terms of the decree of the 8th of July, 1869, must be paid by the Defendants. The relators were bound to satisfy the Attorney-General of the existence of a public nuisance, and, in answer to his inquiries, to produce evidence before him, more especially as the memorial presented by the Defendants against the *fiat* rendered necessary an investigation, and strict proof of the case of the relators, before the Attorney-General.

With respect to the disallowance of all costs relating to the proceedings before the Attorney-General upon the memorial by the Defendants, pending the appeal the expenses incurred by the relators in resisting that memorial are costs of suit, especially as the memorial was an avowed attempt to influence the result of the appeal.

V.-C. B.
1871
ATTORNEY-GENERAL v. CORPORATION OF HALIFAX.

Mr. *Bristowe*, Q.C., and Mr. *G. Williamson*, for the Defendants:—

In matters of this sort the Court must delegate questions of detail to the discretion of the Taxing Master, and will not interfere, however small and unsatisfactory the remuneration may be, especially in the case of obtaining instructions for the bill: *Stephens* v. *Newborough* (1). The Taxing Master has said that these expenses are not costs of suit, but incidental expenses prior to the institution of the suit. With regard to the second class of items, in relation to the memorial and counter memorial before the Attorney-General, pending the appeal they have been rightly disallowed by the Taxing Master, the order of the 6th of December, 1869, being that Defendants should pay such costs as Plaintiffs would have been entitled to receive if the petition of appeal had been dismissed with costs.

[They referred to the Regulations as to Fees, 1860, *Morgan's* Chancery Acts and Orders (2).]

SIR JAMES BACON, V.C.:—

Upon the first point I have not the slightest doubt. The certificate of the Taxing Master puts it beyond all possibility of question that he did allow the sum of 100 guineas for preliminary expenses before the institution of the suit, and that he did disallow the costs of the application for the Attorney-General's *fiat*. In my opinion he was wrong in that. I think the application for the Attorney-General's *fiat* was as necessary as anything else that took place before the suit. The information could not have been filed without it; it was an indispensable condition. It was a proceeding in the suit in the strongest sense, in my opinion. If I had found—as I was at first led to believe—that the Taxing Master, looking at the whole matters that had preceded the institution of the suit, had allowed 100 guineas as a lump sum, to include everything, I should have thought that the charges for obtaining the *fiat* of the Attorney-General were included in that 100 guineas. But it is impossible to read the certificate of the Master and come to such a conclusion. The Master has made a plain, clear, and obvious distinction between

(1) 11 Beav. 403. (2) 4th Ed. App. xxxiii.

the 100 guineas which he allowed, and the charge for obtaining the *fiat*, which I think was a proceeding in the cause.

The second question is one of more difficulty, owing to the discussion which took place before the Lord Chancellor; but I do not read in the Lord Chancellor's observations any kind of refusal to give the costs that were asked for, but his Lordship leaves it to the Taxing Master to deal with them as costs in the cause. The question, therefore, comes to be, whether they are costs in the cause. Now, first of all, it is a proceeding taken in the cause, intituled in the cause, and used for the purposes of the cause. The appeal was then pending, as the memorial itself stated; and that memorial was presented to the Attorney-General for the purpose of influencing the appeal which was then pending. If it had succeeded it would at once have been made use of upon the re-hearing, which was then about to come on; and that that is so, is stated by the memorial itself in unmistakeable terms.

Now, considering that the expense has been incurred by a proceeding in the cause, which was intended to be made use of upon the hearing of the appeal, somebody must pay the costs of it. Who is to pay those costs? The relators, who have been found right throughout—who, by the confession of the Defendants, are now ascertained to be quite right? Certainly not. The Defendants, when they found that this contrivance did not answer the purposes for which it had been conceived, came and desired that their appeal might be at once disposed of, and treated as if it had been on that day dismissed with costs. I think the proceeding which they took before the Attorney-General was a proceeding in the cause, and as much subject to taxation as any other proceeding which has been had in the cause. The matter will be referred back to the Taxing Master to tax the costs in question, with a direction that they are costs of the cause.

Solicitors: Messrs. *Edwards, Layton, & Jaques*, agents for Messrs. *Holroyde & Smith, Halifax;* Messrs. *Williamson, Hill, & Co.*, agents for Messrs. *J. E. Norris & Foster, Halifax.*

V.-C. B.
1871
June 9.

In re MERCANTILE AND EXCHANGE BANK. *Ex parte* LONDON BANK OF SCOTLAND.

Companies — Agreement for Purchase of Goodwill — Allotment of Shares to Directors "for Distribution amongst their Shareholders"—Release—Abandonment of Shares—Return of Call Moneys—Specific Performance—Delay—Standing by.

By an agreement in June, 1864, between two limited banking companies, it was agreed that company *L.* should be dissolved, and that their goodwill should be taken over by company *M.*; that *M.* should increase their capital, and that 10,000 of the new shares, credited with £10 each, should be "allotted at par to the directors" of *L.* "for distribution amongst their shareholders," the *L.* directors paying £100,000 consideration for the new shares to be issued to them. Of the 10,000 shares only 9740 were applied for and allotted to *L.* shareholders. In 1865 the *L.* directors issued a circular to their shareholders dissuading them from taking *M.* shares. In 1866 the *M.* bank made a call, which was badly met, and many shares were forfeited in consequence, including some held by the liquidators of the *L.* bank. In March, 1867, a mutual release was executed between the companies. It recited that the £100,000 had been paid, and (inconsistently with the fact) that the *M.* bank had duly allotted to such persons as the liquidators of the *L.* bank directed the 10,000 shares mentioned in the agreement. In November, 1867, a right to "a large number" of unissued *M.* shares was asserted by the secretary of the *L.* liquidators in a letter, but no step was taken. In September, 1868, a formal demand was made by the solicitors of the *L.* liquidators for the remaining shares.

In February, 1869, the *M.* bank was wound up, and the *M.* liquidators made a return of £5 10s. per share to their shareholders, calls having been made upon them and paid for moneys which were found not to be required.

Upon the *L.* liquidators claiming to be entitled, on behalf of the *L.* shareholders, to participate in the return to the extent of 260 £10 shares :—

Held, that the agreement was now incapable of specific performance; and summons dismissed.

Adjourned Summons.

On the 22nd of June, 1864, an agreement was entered into between the *Mercantile and Exchange Bank, Limited*, and the *London Bank of Scotland, Limited*, for the dissolution of the *London*, and the transfer of its goodwill to the *Mercantile*, which, so far as material, was as follows:—

1. That the *Mercantile* should increase its capital of £2,000,000, in 40,000 shares, to £4,000,000, in 80,000 shares of £5 each.

2. That 10,000 of the new shares, credited with £10 per share, and 10,000 further of such new shares, credited with £5 per share, should, upon the terms thereafter mentioned, be "allotted at par to the directors" of the *London*, "for distribution amongst their shareholders."

3. That of the remaining 20,000 shares, 2000 should be "allotted at par to the directors" of the *London*, and the remaining 18,000 should be distributed by the *Mercantile* "rateably amongst the holders of the existing capital, and the holders of the 20,000 new shares referred to in Art. 2," except so far as the directors of the *Mercantile* might, under the authority of the resolution authorizing the increase of capital, reserve a portion of such 18,000 shares "for the benefit of" the *Mercantile*.

4. That the consideration to be paid by the directors of the *London* to the *Mercantile* for the new shares to be issued under Art. 2 should be as follows:—

(*a*). The payment of £100,000, being £10 per share on the 10,000 shares, and £50,000, being £5 per share on the further 10,000 shares to be issued by the directors of the *London*, pursuant to Art. 2, "such £100,000 and £50,000 respectively to be paid in cash, or in such assets or securities" of the *London* as the directors of the *Mercantile* might consent to receive in lieu of cash.

(*b*). The payment of such a sum as should be equal to one-third part of four years' purchase of the excess of net banking profits of the *Mercantile* over the net banking profits of the *London*, calculated as therein stated.

(*c*). The payment of such a sum as, under Art. 5, the arbitrators or their umpire might certify to be one moiety of the reserve fund of the *Mercantile* existing on the 30th of June, 1864.

7. The *London* were to take immediate measures for voluntarily winding up the company, and transferring the goodwill of their business to the *Mercantile*.

This agreement was signed by the directors of both companies, and was approved and confirmed at meetings of the shareholders of both companies, held on the 5th of July, 1864.

On the 22nd of the same month, at a meeting of the *Mercantile* shareholders, the capital of that company was increased to £4,000,000, by the creation of 40,000 new £50 shares; and it was

V.-C. B. 1871 *In re* MERCANTILE AND EXCHANGE BANK. *Ex parte* LONDON BANK OF SCOTLAND.

provided that 20,000 of such shares should be issued and appropriated as follows:—20,000 towards carrying out the agreement with the *London;* 15,000 rateably amongst such persons as should, on a day to be fixed, be shareholders of the *Mercantile,* and who should pay, on a day to be named, a premium of £2 and a deposit of £2 10*s.* per share; and 5000 to be retained by the directors for further carrying into effect the agreement, and for promoting the future interests of the *Mercantile.*

It was arranged that the persons who were to become shareholders in the *Mercantile* in respect of the 10,000 shares to be credited with £10 should send, through the *London* to the *Mercantile,* the usual form of application to the *Mercantile* for allotment of shares; and very soon after the last-mentioned arrangement there were sent through the *London* to the *Mercantile* applications for 9740 of the shares, then at a considerable premium, which were duly allotted. Amongst the allottees were the liquidators of the *London,* but in their private capacity only. Shortly afterwards the market value of the *Mercantile* shares fell nearly to par; and the remaining 260 shares were never applied for or allotted.

On the 3rd of April, 1865, the directors of the *London* issued a circular to their shareholders, in which, after referring to Art. 3 of the above agreement, they went on to say:—

"In the present state of affairs, however, the liquidators feel that holders of the new shares may prefer to abstain from taking the shares in the *Mercantile and Exchange Bank.*"

They then proceeded to state the particulars of a modification of the terms of the agreement, to which it was thought probable the *Mercantile* directors would agree, and continued:—

"You will see, therefore, that the question put is this, whether you would prefer to have £5 per share credited to your account in the liquidation of this bank, and not take the *Mercantile* shares, or to have £5 paid to the *Mercantile* and take the shares at par, remaining of course liable to the other payments necessary for the liquidation."

They concluded by saying they believed it to be most for the interest of their shareholders not to take the *Mercantile* shares.

In January, 1866, the *Mercantile* made a call of £2 10*s.* per share on their shareholders, payable as to £1 5*s.* on the 11th of June, and as to £1 5*s.* on the 11th of July then next. No formal notice of such call was sent by the *Mercantile* to the liquidators of the *London* or to any one else in respect of the 260 shares.

On the 13th of August the *Mercantile* sent a notice to their shareholders, including the liquidators of the *London*, who had not paid the call, that their shares would be liable to forfeiture if the calls were not paid on or before the 1st of September following.

Mr. *George Haigh*, the solicitor to the *Mercantile*, said that in August, 1866, he had an interview with Mr. *George Menzies Clements*, manager for *Buchan & Co.*, solicitors to the liquidators of the *London*, on the subject of the then unsettled matters pending between the companies; and as regarded the unallotted shares, he stated to Mr. *Clements* that if it was intended to take them up, the names of the parties into whose names they were to be allotted should be furnished; when he replied to the effect that he did not expect the *Mercantile* would hear anything more about them, as the parties would be unwilling to incur responsibility in respect of them.

On the 3rd of September the shares held by the liquidators of the *London* in their private capacity were forfeited by the *Mercantile* directors for non-payment of the call.

On the 20th of March, 1867, a release was executed between the two companies. The deed recited the above agreement of the 22nd of June, and the resolutions of the 5th and 22nd of July, 1864, and that the liquidators of the *London* had paid to the *Mercantile* the £100,000 as provided in Art. 4, and had also paid to the *Mercantile* nearly the whole of the moneys payable under clauses B and C of the same article, but had paid no part of the £50,000 provided for by clause A; and then recited as follows:—"And whereas the *Mercantile Bank* duly allotted to such persons as the liquidators of the *London Bank* directed the first 10,000 shares in the *Mercantile Bank*, with £10 per share paid thereon;" and further recited that no allotment had been made of the second 10,000 shares, nor of the 2000 shares. The deed then witnessed that the parties agreed to rescind so much of the agreement as

V.-C. B. 1871 *In re* Mercantile and Exchange Bank. *Ex parte* London Bank of Scotland.

related to the second 10,000 shares, the £50,000, and the 2000 shares, and gave mutual releases respecting them.

The above recital was untrue so far as it extended to the above-mentioned 260 shares, which were never allotted.

In the course of the year 1867 a correspondence took place between the liquidators of the *London* and the manager of the *Mercantile*, with respect to the payment by the former to the latter of an outstanding cash balance then due; and in a letter dated the 27th of November, 1867, the secretary of the liquidators, writing to the manager of the *Mercantile*, observed: "And also, we having a right to a large number of shares which have not yet been applied for, it will perhaps be more convenient to both parties to allow the account to work itself out."

To this the manager replied on the 28th of November, 1867, by a letter, in which he said: "We cannot now admit your right to shares which have not been taken up."

No further steps appeared to have been taken until the 28th of September, 1868, on which day a letter was addressed by the liquidators' solicitor to the solicitors of the *Mercantile*, making formal demand for an allotment of the remaining shares, which was refused.

On the 25th of January and 15th of February, 1869, resolutions were passed and confirmed to wind up the *Mercantile Bank*. At this date £12 10*s*. per share had been called and paid up on the £50 shares of the *Mercantile*.

The liquidators of the *Mercantile* paid all the debts, and returned to the shareholders, on account of the calls, sums amounting altogether to £5 10*s*. per share, and a further return was expected.

On the 13th of June, 1870, the liquidators of the *London* took out the present summons for a declaration that the applicants were, at the date of the *Mercantile* winding-up resolutions, and still were, "in equity the holders of" 310 (being an error for 260) shares of £50 each in the *Mercantile* upon each of which £10 were paid up at that date; and that the applicants were entitled to receive from the *Mercantile* and their liquidators out of the funds of the *Mercantile* the same sum per share for and in respect of the 310 (260) shares, as the liquidators had returned, or offered to return, to the holders of other like shares in the *Mercantile;* and for consequential inquiries.

Mr. *Charles Hall*, and Mr. *Davey*, for the applicants:—

The case is one of vendor and purchaser. The *Mercantile* being in a position to discharge their liabilities, having made a call which turns out to have been unnecessary, and being about to return the money, propose to divide that money amongst their shareholders, to the exclusion of the *Bank of Scotland*. As they have had our purchase-money to the full extent of the £100,000, and there being a release as to all the shares—which operates only as a release to the extent of 9740—we claim the benefit of the 260 shares for the *Bank of Scotland*, as part of the property for which we agreed to pay, and have paid, our money.

Mr. *Fry*, Q.C., Mr. *Hemming*, and Mr. *J. C. Bigham*, for the liquidators of the *Mercantile*:—

Taking this as a claim by a purchaser, who has paid his purchase-money, to property which has not been delivered to him, he is a purchaser who lay by from June, 1864, to November, 1867, while the bank was passing through a period of difficulty, and making calls to meet it, before he made any demand. Not till a return of capital to shareholders was expected did he bestir himself.

But the claimant's position is not that of an ordinary purchaser. A person who buys shares cannot say that he has paid the price until he has, over and above the money payment, undertaken the liability incident to the shares, and this the applicants deliberately declined to do, so long as the position of the bank was in doubt. By offering to take the shares when the risk is passed they do not perform their part. They are seeking to have made to them an allotment of shares, only that they may participate in the distribution of capital which is going on. But the *Bank of Scotland* has no power to hold shares in another banking concern in their own name; if they want the shares, their directors must send in the names of such of their shareholders as desire to become allottees. By the 161st section of the *Companies Act*, 1862, liquidators may receive shares in compensation for sales, but only "for the purpose of distribution amongst the members of the company being wound up." It is quite plain that after the price fell the directors did not recommend the shareholders and the shareholders did not want to take more *Mercantile* shares than they were obliged; and

V.-C. B. 1871

In re Mercantile and Exchange Bank. *Ex parte* London Bank of Scotland.

they actually allowed a forfeiture to take place of some of the shares that had been allotted.

That there was nothing here which could compel the directors to take these shares, and that they had no power to take or accept them, appears from *Joint Stock Discount Company* v. *Brown* (1) and *Lindley* on Partnership (2). Directors who enter into contracts in that character are merely agents of their company: *Ferguson* v. *Wilson* (3). The agreement does not, in fact, impose an obligation to take shares on anybody. All that was bargained for was the privilege of placing a certain number of shares; and this could only be claimed within a reasonable time. Then the purchaser, having exercised the option that was open to him, by omitting to take, and so relinquishing the shares, cannot be allowed now to turn round and alter what was then his deliberate resolution.

Mr. *Hall*, in reply:—

The questions are, first, whether the agreement was executory or executed; secondly, whether the claim of the *London* was barred by time.

It is said that this was not a contract, but merely an option. But whether it was an option or not makes no difference in the legal position; and that must necessarily have been a contract which required a release.

The whole of the money due to the *Mercantile* has been paid, and there never has been any direct agreement to abandon these shares. We are entitled to damages at law for breach of the agreement. Had the shareholders had to contribute, they would have had to contribute in respect of these shares.

The winding-up took place in February, 1869, and in June, 1870, this summons was taken out. The applicants, therefore, have been sufficiently prompt.

Sir James Bacon, V.C.:—

This case was opened as a very singular case; and no doubt it is singular, not only in its form, inasmuch as it is an application by

(1) Law Rep. 8 Eq. 381. (2) 2nd Ed. p. 662.
(3) Law Rep. 2 Ch. 77.

the *London Bank of Scotland* to be put on the list of contributories in a winding-up, but from the circumstances under which it is preferred.

The case must be decided mainly upon the contract between the parties—that is the first thing to be regarded—and the contract in this case must be looked at closely.

There were two joint stock companies; one desired to sell, the other desired to acquire, the business, goodwill, and assets of the other. The terms upon which they were to deal were agreed upon. The sum of £100,000 was to be paid by the company ceasing to carry on business, and in return for that 10,000 shares, upon which £10 each had been paid, were to be allotted. To be allotted how? "To be allotted at par to the directors of the *London Bank of Scotland, Limited*, for distribution among their shareholders." They, as directors, were dealing for the interest of their shareholders. They were assigning and surrendering the assets, the property of their shareholders, and they desired to have what was thought to be an equivalent. It is said that this is a perfectly proper, legal, and valid stipulation, for that the *Companies Act* enables an official liquidator to take and allot for distribution among the shareholders whom he represents shares in any other company; and no doubt that is so. But when a share is allotted, the consequence of allotting it is, that the person to whom it is allotted takes upon himself burdens, sometimes of very great weight—always burdens—and a company cannot allot its shares in any way, to any person whomsoever, upon whatever terms, unless at the same time the person to whom the allotment is made stipulates to perform all the obligations that are contained in the general contract. The allotting to the directors, therefore, it is admitted, is not an allotment to them personally—it could not be so according to law; for, the directors acting as an executive body for this company, which has no power of holding shares in another bank, could not have allotted to them for the benefit of their company the shares in question, or any other shares.

What, then, does the agreement mean? The vendors, as they are called, say: "We will allot 10,000 shares, but we will allot them when you bring us the names of persons who are willing to take

V.-C. B. 1871 *In re* MERCANTILE AND EXCHANGE BANK. *Ex parte* LONDON BANK OF SCOTLAND.

upon themselves the burdens which follow the allotment. Although we allot them at par, treating £10 as paid towards their contributions, they shall also undertake at the same time to pay whatever else may be required of them." Can any other meaning be ascribed to this contract? If it was not contrary to law for the directors to take shares allotted to themselves personally, it would be impossible still to suppose that, by this contract, they intended to take any such burden upon themselves. Of the 10,000 shares which the directors of the *Mercantile Bank* have agreed to allot, all were taken in the manner that the agreement points out, excepting only 260; and, the agreement being in June, 1864, from that time to this no shareholder in the *London Bank* has ever offered to take any of the 260 shares, nor has the name of any individual been submitted to the directors of the *Mercantile Bank*, nor has the *Mercantile Bank* ever had tendered to them any name, or ever had any opportunity of performing that plain and explicit agreement which they entered into, to allot 10,000 shares, or as many more or less as might be necessary, on having the conditions upon which that allotment was to be made performed. I am at a loss to see what the *London Bank of Scotland* have to complain of. They were to have had for the benefit, not of themselves, but of the shareholders, 10,000 shares. They have had 9740 allotted as they chose to direct. What is the consequence of that? The whole number of shareholders in the company, the introduction of which they stipulated for by the agreement, is less than it otherwise would have been. That is no disadvantage to the persons who are admitted. There are fewer shareholders. It is true there are fewer to bear the burdens; but if there were any profits, it is so much the more advantageous to the smaller company. However that might be, it is bootless to inquire now.

The question is, whether the agreement which was entered into has been properly performed. Mr. *Charles Hall*, and Mr. *Davey* with him, say they are entitled to claim on the ground of specific performance. There is an obstacle always to specific performance in this Court, if the parties cannot be put in the condition for which they stipulated when the agreement was entered into. How is it possible that the *Mercantile Bank*, who stipulated that, if they

gave these 10,000 shares, they should have 10,000 subscribers at least bound with them to bear all the obligations of the company, can be restored to their position, when they can now have no subscribers bound with them as far as the 260 shares go? It is impossible that the principle of specific performance can in any degree be applied to it. There are other difficulties in the case with reference to the £100,000. It has been paid in a certain manner and form; and the admission is, that it has been acquitted, and that there is nothing due in respect of it. That is a fact not on this occasion to be disputed at all. But, then, in return for that, 9740 shares have been allotted to such persons as the *London* directors chose to nominate for that purpose—the only persons who could be procured to take them; and if the directors, whatever is the construction of the agreement, could not find people to take the 260 shares, unless it could be held—which is impossible—that they were bound to take them themselves, with the benefits and with the burdens, everything has been done which it is incumbent upon them to do in performing the agreement. And when reference is made to the subsidiary contract as to the smaller number of shares on which £5 was paid, the circular which submitted that matter to the shareholders shews, in my opinion, that the *Mercantile Bank* are perfectly justified in saying that was an option submitted to the shareholders. The advantage of taking or not taking a smaller number of shares is plainly put before them. They are asked to choose whether they will do the one or the other. And there is a word of advice at the end of the circular, suggesting to them that they had better have nothing whatever to do with them. A more plainly optional transaction cannot be conceived. Mr. *Hall* calls it in aid of his argument to shew that there was nothing optional in the contract in its origin. As I read it, it was purely optional on the part of every shareholder in the *London Bank of Scotland* to say whether he would or would not take any one share upon the terms proposed. That this has been a question between the parties is clear from the correspondence and the communications which are mentioned in the affidavits. I do not think, however, that that is of any importance in the matter, or that it ought to influence the decision to be pronounced upon it.

V.-C. B.
1871
In re MERCANTILE AND EXCHANGE BANK.
Ex parte LONDON BANK OF SCOTLAND.

But, as far as it goes, it is quite clear that there was a suggestion on the part of the *Mercantile Bank*, from the earliest dated letter that is referred to, that it would be convenient to (what is called) cancel these shares—that is to say, to have done with them. The object for which they had been originally created, or contracted to be created, had vanished, and it was time that they should be put out of the way. It is said that no calls were made upon the directors in respect of these shares. No calls could be made upon the directors. You could only call upon the persons to whom shares had been allotted. It is not pretended that any shares were at any time allotted to these directors; and although calls seem to have been duly enough made upon all the persons whose names stood on the books of the company, and who were liable to pay contributions when they were called upon, no call was made upon these parties, because of necessity none could be made.

The delay, no doubt, is a matter of considerable importance. Without adopting anything like the rule about six months, or about twelve months, which Mr. *Hall* referred to, the delay which has taken place—or rather the absence of any claim on the part of the *London Bank of Scotland* to have any one put upon the share list in respect of these shares, ought to have considerable weight if the rest of the case were doubtful. In my opinion, it is not doubtful from its very beginning to its end.

With respect to the notion Mr. *Hall* insisted upon earnestly, that he might be entitled to sue for damages for the breach of the agreement, it is clear that there has been no breach of the agreement. The directors could not say they were damaged; they have had all that they ever thought of asking for under the agreement. They do not even now ask to have shares allotted to them; and if they did, the winding-up having commenced, of course it would be impossible; but damage they have sustained none. The agreement has been performed as far as they are concerned. Every shareholder whose name they furnished to the *Mercantile Bank* has had his shares allotted to him, as I must assume from what appears before me. The claim for damages, therefore, in my opinion, either in this Court or a Court of Law, is out of the question. At law it would be impossible to frame it, and in this

Court it is without foundation. I think that part of the case entirely fails.

The summons is in these terms—it is an application on the part of the *London Bank of Scotland* "that it may be declared that the applicants were, at the time of passing the special resolutions for winding up the *Mercantile and Exchange Bank, Limited* (hereinafter called the *Mercantile Bank*), now in course of winding up voluntarily, and still are, in equity, the holders of 260 shares of £50 each in the *Mercantile Bank*, upon each of which £10 were paid up at the date of passing the said special resolutions; and that the applicants are entitled to receive from the *Mercantile Bank* and the liquidators thereof for the time being, out of the funds of the *Mercantile Bank* in the hands of the said liquidators, the same sum per share for and in respect of the said 260 shares as the said liquidators have returned, or offered to return, or shall hereafter return, or offer to return, to the holders of other like shares in the *Mercantile Bank*, the amount paid upon which was originally £10 per share, or was reduced to that amount by previous return by the directors or liquidators of the *Mercantile Bank;* and that an inquiry may be made," and so on. Now, on what possible grounds can I say that these directors—who never were shareholders, who never could by law be shareholders, who by the very terms of the contract it never was intended should be shareholders—should take any sum of money by way of refunding or repayment by the official liquidator in respect of calls which they have never paid—in respect of interests which they have never possessed?

In my opinion the summons proceeds upon a mistake—a plausible representation, indeed, I am fain to admit, after the earnest and able arguments I have heard both from Mr. *Hall* and Mr. *Davey*. Some plausibility there is in it, when it is put as a case for specific performance; but when the agreement, the specific performance of which is sought, comes to be examined, it is one which not only never was to be performed in the sense assigned to it, but which was, from the beginning, incapable of performance without the interference of other persons, whom the directors could not control, and is now, beyond all question, wholly incapable of specific performance.

V.-C. B. 1871 *In re* MERCANTILE AND EXCHANGE BANK. *Ex parte* LONDON BANK OF SCOTLAND.

I am of opinion, therefore, that there is no ground for the application made by this summons, and that it must be dismissed with costs.

Solicitor for the Applicants: Mr. *G. M. Clements*, agent for Messrs. *Bircham & Co., London.*

Solicitors for the Respondents: Messrs. *Chester & Urquhart*, agents for Messrs. *Haigh & Co., Liverpool.*

V.-C. B. 1871 *June* 20.

VISCOUNT HOLMESDALE *v.* WEST.

Will—Executory Devise—Settlement—Shifting Clause upon Accession to Dignity—Vesting of Portions not to be postponed until Death of Person exercising the Power—Jointures not to fail.

Testatrix, by will, dated in 1860, devised freeholds to the use of trustees and their heirs, upon trust for *E.* for life, remainder to the use of *C.*, the first son of *E.*, for life, without impeachment of waste, remainder to the use of his first and other sons successively in tail male; with remainders in like form to the use of the third (passing over the second), fourth, and other younger sons of *E.* for life, and their respective first and other sons in tail male, with divers remainders over. The settlement contained powers to the sons of *E.* thereinbefore named of jointuring and of charging portions.

By letters patent, dated in April, 1864, the barony of *B.* was conferred upon *E.* for life; and after her death, upon *R.*, the second son of *E.*, and the heirs male of his body; and in default of such issue, to the third, fourth, and fifth sons of *E.*, and the heirs male of their bodies respectively. The letters patent contained a proviso, that if any person taking thereunder should succeed to the earldom of *D.*, and there should then or thereafter be a younger son, or heir male of a younger son, then the succession to the barony should devolve upon the son of *E.*, or the heir who would be next entitled to the barony.

Testatrix, by a codicil, dated in May, 1864, revoked the devise contained in her will, and in lieu thereof devised the freeholds to trustees, upon trust, as soon as conveniently might be after her decease, to "convey, settle, and assure" the same "in a course of entail, to correspond as nearly as may be with the limitations" of the barony, "and the provisos affecting the same contained in the letters patent," . . . and with all such "powers, provisoes, declarations, and agreements" as the trustees should consider proper, or as their counsel should advise.

E. died; and the House of Lords having declared (1) that the estates devised by the codicil ought to be limited in strict settlement to *R.* and the

(1) Law Rep. 4 H. L. 543, 579.

younger sons of *E.* for their respective lives, without impeachment of waste, with remainder to their first and other sons in tail male; that such settlement ought to contain powers of jointuring and charging portions for younger children to the limits contained in the will; and that in the settlement there ought to be inserted a shifting clause in the words of the letters patent:—

Held, that the settlement ought not to contain a clause postponing the vesting of portions until the death of the person creating them:

Held, also, that the settlement ought not to contain a proviso avoiding jointures and portions in the event of the estates shifting on the accession of the earldom.

THE Right Hon. *Mary* Dowager Countess *Amherst*, by her will, dated the 21st of April, 1860, devised all the freehold manors, messuages, lands, tenements, tithes, advowsons, and hereditaments (including the mansion of *Knole*), in the counties of *Kent*, *Warwick*, *Gloucester*, *Sussex*, and elsewhere, belonging to her, or of which she had power to dispose, to the use of trustees and their heirs, during the life of her sister *Elizabeth* Countess *De la Warr*, wife of the Right Hon. *George John De la Warr*, without impeachment of waste, upon trust for her for her separate use; and from and after her decease, to the use of the Hon. *Charles Richard Sackville-West*, commonly called Lord *West*, the eldest surviving son of the Earl and Countess *De la Warr*, and his assigns, for life, without impeachment of waste, with remainder to his first and other sons in tail male; and in default of such issue, to the use of the Hon. *Mortimer Sackville-West*, the third (passing over the second) surviving son of the Earl and Countess *De la Warr*, and his assigns, for life, without impeachment of waste, with remainder to his first and other sons in tail male; with like limitations over to the Hon. *Lionel Sackville Sackville-West*, the fourth, and the Hon. *William Edward Sackville-West*, the fifth, surviving son of the Earl and Countess *De la Warr*, for life, with remainder to their first and other sons respectively and successively in tail male, with remainder to the use of the first and other daughters successively of *C. R. Sackville-West*, *M. Sackville-West*, *L. S. Sackville-West*, and *W. E. Sackville-West* respectively and successively in tail general; remainder to the use of Lady *Elizabeth*, daughter of the Earl and Countess *De la Warr* and wife of *Francis Charles Hastings Russell*, and her assigns, for life, without impeachment of waste, remainder to the use of her first and other sons in tail male;

V.-C. B. 1871 ~~ VISCOUNT HOLMESDALE v. WEST.

remainder to the use of *Mary Katherine*, daughter of the Earl and Countess *De la Warr* and then wife of *James Brownlow William* Marquis of *Salisbury*, and her assigns, for life, without impeachment of waste, remainder to the use of her first and other sons in tail male; remainder to the use of Lady *Arabella Diana Sackville-West*, daughter of the Earl and Countess *De la Warr*, and her assigns, for life, without impeachment of waste; remainder to the use of her first and other sons in tail male; with remainder to the testatrix's own right heirs. The testatrix declared that it should be lawful for each and every of the sons of her sister *Elizabeth* Countess *De la Warr* thereinbefore named, either before or when seised or entitled to the actual freehold of the hereditaments, by deed or will to appoint to and in trust for any woman he might marry, for her life, for her jointure, any yearly rent not exceeding £800, to be issuing out of and chargeable upon all or any part of the hereditaments, and to appoint to any such jointress usual powers of distress and entry. Testatrix also declared that it should be lawful for each son and daughter of her sister thereinbefore named, either before or when seised or entitled to the actual freehold of the hereditaments, by deed or will to charge all or any part of the hereditaments with the payment of any sum or sums for the portion or portions of any child or children of the person for the time being exercising the power, other than an eldest or only son for the time being entitled in tail male in possession or remainder immediately expectant on the uses antecedent to those limited to the sons of such person in tail male, not exceeding in the whole the sum of £10,000 sterling, with interest not exceeding 4 per cent., such portion or portions to be paid at such age or ages, time or times, if but one such child, and if more than one, to be paid to or divided amongst all or any one or more, exclusively of the rest, of such children, at such ages and in such shares, and subject to such annual payments, conditions, restrictions, and limitations as such person should think fit, "and for the purpose of raising such portion or portions, with interest for the same respectively, to appoint the hereditaments to be charged, with their appurtenances, to any person or persons whomsoever, for any term of years whatsoever, without impeachment of waste by way of mortgage, or upon trust to raise the

money to be charged, and the interest thereof, by the usual means." Testatrix further directed that if the sons of her sister, or any of them, should, before they or he should become entitled in possession, appoint any such jointure or jointures as therein aforesaid, or if any of the sons or daughters, before they respectively should become so entitled, should charge the hereditaments or any part thereof with any sum for portions for daughters or younger sons respectively as therein aforesaid, "then and in every such case the annual sum so to be limited as aforesaid shall not take effect upon or charge the hereditaments intended to be charged therewith, nor shall the sums of money so respectively intended to be charged for portions as aforesaid be a lien or charge upon the hereditaments intended to be charged therewith, or become vested in or payable to any person or persons whomsoever, or be attended with interest, unless and until the person or persons so appointing such annual sums as aforesaid, or so charging the hereditaments respectively with portions as aforesaid, shall actually become entitled to the possession or receipt of the rents and profits of the hereditaments hereinbefore settled by virtue of the limitations hereinbefore contained, or would, if he or she had been then living, have become so entitled." Testatrix further directed that the settled hereditaments should not be subject at any one time to the payment of more than £1200 a year for jointures, or chargeable with more than £20,000 for portions.

She appointed *M. Sackville-West* and *Frederick Iltid Nicholl* to be executors of her will.

In 1864 the barony of *Buckhurst* was created; and by letters patent, dated the 27th of April, 1864, the title was limited to Lady *De la Warr* for life, and after her decease to the Hon. *Reginald Windsor Sackville-West*, second surviving son of Lady *De la Warr*, and the heirs male of his body; and in default of such issue, to the third, fourth, and fifth surviving sons of Lady *De la Warr* and the heirs male of their bodies respectively and successively. The patent contained also the following clause:—

"If the said *Reginald Windsor Sackville-West*, or any other person taking under these our letters patent, shall succeed to the earldom of *De la Warr*, and there shall, upon or at any time after the occurrence of such event, be any other younger son, or any

V.-C. B. 1871 VISCOUNT HOLMESDALE v. WEST.

heir male of the body of any such other son, then, and so often as the same shall happen, the succession to the honours and dignities hereby created shall devolve upon the son of the said *Elizabeth* Countess *De la Warr*, or the heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst*, if the person so succeeding to the earldom of *De la Warr* was dead without issue male."

On the 3rd of May, 1864, Lady *Amherst* made a (second) codicil to her will, whereby, after reciting the devise in her will commencing thus: "Whereas by my said will I have devised all my manors . . . in the counties of *Kent*, *Warwick*, *Gloucester*, and *Sussex*, to or in trust for my sister *Elizabeth*, Countess *De la Warr*, for life, with divers remainders over in a course of entail;" and the grant of the letters patent, she recited as follows:—

"And whereas it is my intention to settle the manors and hereditaments, premises, and effects devised and bequeathed by my said will in a course of settlement to correspond, as far as may be practicable, with the limitations of the said barony of *Buckhurst*, and the deeds for carrying into effect such settlement are about to be prepared, but cannot at present be completed."

She then revoked and made void the devise of the manors and hereditaments contained in her will; and in lieu thereof she devised the same unto and to the use of the Right Hon. *William Archer Amherst* (commonly called Viscount *Holmesdale*) and *Frederick Iltid Nicholl* and their heirs, "upon trust, as soon as conveniently may be after my decease, to convey, settle, and assure all the same manors and hereditaments, copyhold and leasehold premises, and effects, in a course of entail, to correspond as nearly as may be with the limitations of the said barony of *Buckhurst*, and the provisoes affecting the same contained in the letters patent conferring the said dignity, in such manner and form, and with all such powers, provisoes, declarations, and agreements, as the said Viscount *Holmesdale* and *Frederick Iltid Nicholl*, their heirs, executors, administrators, or assigns, shall consider proper, or as their counsel shall advise." At the end of the codicil she added: "And, except as my said will is hereby altered, I confirm the same."

Testatrix died on the 20th of July, 1864, without having made the settlement referred to in her second codicil.

On the 9th of March, 1866, the present suit was instituted by Lord *Holmesdale* and Mr. *Nicholl*, as trustees, against *Reginald W. Sackville-West*, *Mortimer Sackville-West*, *Lionel S. Sackville-West*, *William Edward Sackville-West*, the Earl of *De la Warr*, and the Countess of *De la Warr*, Baroness *Buckhurst*, his wife, stating as above, and praying that a draft settlement, to be prepared on the Plaintiffs' behalf, might be settled by the Judge in Chambers in order to carry into effect the testatrix's second codicil, and that the trusts declared by such codicil might, as far as necessary, be carried into effect by the direction of the Court.

The cause coming on upon motion for decree on the 2nd of June, 1866, an order was made that a proper settlement be approved of by the Judge of the estates directed by the codicil to be settled, and that all proper parties should join in the settlement.

The Plaintiffs, the trustees, accordingly brought in a proposed form of settlement; and a summons, taken out for the consideration of that proposal, was adjourned into Court, and argued on the 15th and 17th of December, 1866.

On the 24th of December, 1866, the Lord Chancellor (then Vice-Chancellor *Wood*) delivered a written judgment, at the close of which His Lordship answered those of the questions argued at the hearing which bore upon the present discussion, in the following manner:—

"I think the settlement must follow the limitations of the letters patent. I think the shifting clause should follow the limitations of the letters patent. Whatever be the validity of the limitations as to the peerage, it will be perfectly good as a shifting clause of the estates tail" (1).

Upon this a settlement was prepared, whereby the estates were limited after the decease of Lady *De la Warr* to the use of *R. W. Sackville-West* and the heirs male of his body, with divers remainders over, and containing a shifting clause in the exact terms of the shifting clause in the letters patent.

(1) Law Rep. 3 Eq. 474, 486.

V.-C. B. 1871 VISCOUNT HOLMESDALE v. WEST.

On the 25th of June, 1867, a certificate by the Chief Clerk of Vice-Chancellor *Wood* that a proper settlement had been made was approved by the Judge; and a summons, taken out on the part of the Defendants, *M. Sackville-West*, *L. S. Sackville-West*, and *W. E. Sackville-West*, to vary the certificate, having been, on the 23rd of November, 1867, dismissed, the order dismissing the summons was taken by appeal to the House of Lords.

On the 9th of January, 1870, *Elizabeth* Countess *De la Warr*, Baroness *Buckhurst*, died; and thereupon the Hon. *Reginald W. Sackville-West* succeeded to the barony.

In February, 1870, the appeal was argued; and, on the 16th of May following, the order dismissing the summons was reversed, and it was declared by the House that the estates devised by the codicil ought to be settled in a course of strict settlement to the second and other younger sons of *Elizabeth* Countess *De la Warr* for their respective lives, without impeachment of waste, with remainder to their respective first and other sons in tail male in the order and succession mentioned in the patent; that the settlement ought to contain powers of jointuring and charging portions for younger children to the limits contained in the will of the testatrix; and that in the settlement there ought to be inserted a shifting clause in the words contained in the settlement mentioned in the certificate (1).

The settlement had been accordingly resettled by the conveyancing counsel in accordance with the order of the House of Lords, but in such settlement were inserted the following clauses.

After the power of charging portions, were inserted the words:—

"Such portion or portions respectively to be made raiseable upon or after the decease of the party so charging the same."

And after the clause limiting the extent of the powers of jointuring and charging portions, the following:—

"Provided also, that if the use or estate hereinbefore limited to the said *Reginald Windsor* Baron *Buckhurst*, *Mortimer Sackville-West*, *Lionel Sackville Sackville-West*, and *William Edward Sackville-West* respectively, for their lives as aforesaid, or any one or more of such life estates, shall be determined and made void by

(1) Law Rep. 4 H. L. 543, 579.

such succession of the party respectively entitled thereto, to the earldom of *De la Warr* as aforesaid, then and in every such case all such jointures and portions (if any) as may have been made or charged, or covenanted to be made or charged, by any and every of them whose estate or respective estates for life shall be so determined, and all powers and remedies, terms of years, trusts, and provisions limited, created, or made for securing the raising and payment thereof, shall thenceforth cease and become void."

On behalf of Lord *Buckhurst* an objection was raised in Chambers to the insertion of these clauses, and the point was now adjourned into Court to be argued.

Mr. *Amphlett*, Q.C., and Mr. *Kekewich*, for Lord *Buckhurst*:—

It may happen that Lord *Buckhurst* may succeed to the earldom of *De la Warr*, and in so doing may take no estates at all; or, if he should take any estates, may take them without any power of jointuring or raising portions out of them, should the *De la Warr* settlement contain no such powers, or if the powers in the *De la Warr* settlement should have been exhausted. He may therefore be wholly deprived of power to provide for his wife and children.

The question is virtually settled by the decree of the House of Lords; but, independently of that decision, the retention of these words is so unreasonable as to be opposed to any probable intention of the settlor.

The principle of the House of Lords' decision is, that the language creating the executory trust is to be subordinated to the intention of the settlor; and it would be wholly inconsistent with this intention to deprive the holder of the barony of *Buckhurst* of the power to make an indefeasible contract.

According to usual practice, a proviso for shifting on the accession of another estate is followed by a declaration that the determination of the estate of the person is not to prejudice uses, estates, or trusts before limited, appointed, or created: *Peachey* on Settlements (1). Only special circumstances, which do not occur here, justify a departure from the rule.

(1) Page 969.

V.-C. B. 1871

VISCOUNT HOLMESDALE v. WEST.

Mr. *Eddis*, Q.C., and Mr. *E. Leigh Pemberton*, for Viscount *Holmesdale*:—

The insertion of these words is necessary in order properly to work out the decree of the House of Lords. No doubt the principle of that decision is, that the intention of the settlor is to prevail. But what was that intention? In the words of Lord *Westbury* (1), it was "to make provision for the support and maintenance of the dignity" of the barony of *Buckhurst*. If these words are excluded, the effect will be that the estates intended for the support of the barony may go over charged with jointures and portions, and be a barren inheritance. The effect of striking out the words relating to the vesting of portions will be that portions may be made to vest at the birth of children. In any event, the clauses must stand or fall together.

It may be the common practice in framing what are called "name and arms" clauses, to provide that the jointures and unvested portions shall not fail; but the distinction is obvious. Where the shifting takes place in consequence of some default of the owner, there he alone forfeits his estate, and the widow and children do not suffer; but where it takes place in consequence of the acquisition of other estates, over which a new exercise of powers of jointuring and charging may be made, the former estates are to go over unincumbered.

In this case it is at least highly improbable that the *De la Warr* settlement contains no powers of jointuring or settling, or that such powers will have become exhausted.

Mr. *C. Hall*, for the trustees of the settlement.

Mr. *Amphlett*, in reply.

SIR JAMES BACON, V.C.:—

No doubt the case is not without considerable difficulty, because you have to guess very much at what was the intention of Lady *Amherst*, and how that intention ought best to be carried into effect.

I do not think it is helped very much by any speculations that

(1) Law Rep. 4 H. L. 569.

may be indulged in as to the earldom of *De la Warr* being a barren inheritance carrying with it no estate, or means of providing for children, and so on.

On the other hand, how can it be imputed to Lady *Amherst*, who by her will made a strict settlement of the *Buckhurst* estates, and who by the codicil to her will intended that there should be a strict settlement of the estates, that she intended that the owner of the barony of *Buckhurst* should be unable to contract an advantageous marriage, or that he should be unable to provide for the children he had by that marriage, whether he became Lord *De la Warr* or not, when the words of that codicil completely and distinctly point out that there shall be a settlement, and the House of Lords have said, quoting those very words, "with all such powers, provisoes, declarations, and agreements," that the will shall be taken as a model for the settlement?

Could it be the intention of Lady *Amherst* that the *Buckhurst* estate should be so settled as that the owner for the time being should not be able to enter into those most important social contracts which are involved in the provisions for jointure and portions for younger children, and that by some mere accident those contracts should be utterly set aside and annihilated? That would be to impute to her a most unreasonable intention.

There is nothing unreasonable in carrying the intention into effect as by this settlement is provided, leaving out the proviso for cesser, and the other provision about raising portions, those portions not being raiseable until the periods mentioned. I cannot help thinking that, by retaining the proviso for cesser, infinite mischief may be done and great inconvenience created. Certainly what I take to be the plain intention of the testatrix, and the confirmation of that intention by the House of Lords, would be utterly defeated if I were to do so. There may be an inconvenience if the *Buckhurst* estate should, after the peerage of *De la Warr* has acceded, go over to the next taker charged with the £20,000 and the £1200 a year jointure. This possibly may be no very heavy burden; but, whether the burden is heavy or light, these are considerations which ought not to influence the judgment of the Court.

I think that the settlement must stand, leaving out the pro-

V.-C. B. 1871 VISCOUNT HOLMESDALE v. WEST.

visoes for postponement and cesser of portions and jointures. That is the best I can do with it. I do not mean to say the question is without considerable difficulty, on account of the obscurity and doubt which must attend such subjects. The Court has to frame a new settlement, and to find its way as well as it can in the dark to the intentions which are supposed to regulate the instrument. The power of leasing which is given is not, I suppose, to go over, and why should the contract of jointure be put an end to?

The costs of this application may be taken out of the estate.

Solicitors for Lord *Buckhurst:* Messrs. *Cope, Rose, & Pearson.*

Solicitors for Viscount *Holmesdale:* Messrs. *Pemberton, Meynell, & Pemberton.*

Solicitors for the Trustees: Messrs. *Nicholl, Burnett, & Newman.*

V.-C. B. 1871 *June* 21, 22.

WEDGWOOD *v.* DENTON.

Will—Condition, whether discharged—Alteration of Circumstances—Republication by Codicil.

13 Ch D 360, 3.

A., by will made in 1863, gave her house in *Z.*, "held under the Corporation of *X.* for the life of *T. K.*, and the term of twenty-one years after his death," and the furniture and effects in the house, her carriage and horses, pew in church, and a sum of £8000, to trustees upon trust during the lives of her nieces *B.* and *C.*, so long as they should remain single and reside in her said house in *Z.*, and keep the same in repair, to pay to them the rent of another house and the income of the £8000, and to permit them to reside in the said house during the remainder of the said term for which the said house was held of the Corporation of *X.* If either of them should marry or die before the expiration of the term, or should cease to reside in the house, £500 was to be paid to the one who married, and the rents and dividends were to be paid to the other in case she resided in the house, with a gift over in favour of another niece, *D.*, in case both *B.* and *C.* should die or cease to occupy the house before the expiration of the said term.

T. K. died in 1865, whereupon the testatrix surrendered the estate, and obtained from the corporation a lease of the house at *Z.* for a term of seventy-five years:—

Held, that, notwithstanding the surrender of the original lease, the trusts and conditions declared by the testatrix were valid for at least the period of twenty-one years from the death of *T. K.*

BY her will, dated the 6th of November, 1863, *Catherine Wright*, spinster, after certain devises and bequests, gave, devised, and be-

queathed "the house in *Brownlow Street, Liverpool,* in which I reside, with the garden, coach-house, stables, and premises thereunto belonging, held under the Corporation of *Liverpool* for the life of Mr. *Thomas Kay* and the term of twenty-one years after his decease," and the furniture, plate, linen, pictures, and effects, and whatever the house contained, except money and securities for money; also her carriage and horses and all appertaining thereto, her pew in *Trinity Church, Liverpool,* and also her freehold house in *Brownlow Street,* in the occupation of *James Denton,* and the sum of £8000, unto *James Denton* and *Thomas Webster,* their heirs, executors, administrators, and assigns, upon trust during the joint lives of *Mary Amery Wedgwood* and *Edith Wedgwood,* and so long as they should both continue single and should reside together in her said house in *Brownlow Street* (occasional absence for health or pleasure excepted), and should keep the same and the furniture and effects in good order and repair, to pay the rent of the house in the occupation of *James Denton,* and the dividends, interest, and annual produce of the £8000 cash (which was thereby directed to be invested) to the said *Mary Amery Wedgwood* and *Edith Wedgwood* in equal shares, and permit *Mary Amery Wedgwood* and *Edith Wedgwood* "to reside in the said house now occupied by me, and to use the furniture and other effects, carriage, horses, and pew hereby bequeathed, during the remainder of the said term for which the said house is held of the Corporation of *Liverpool,* as aforesaid." In case either of them should marry or die before the expiration of the said term, or discontinue or cease to reside in the house occupied by the testatrix, then upon trust to pay the rent, dividends, interest, and annual produce to the survivor, or other of them, so long as she should continue to reside in the said house (occasional absence for health or pleasure excepted), and should keep the same, and the furniture and effects, in good order and repair, and to permit such survivor or other of them, so long as aforesaid, to reside in the said house, and to use the said furniture and other effects, carriage, horses, and pew, during the remainder of the said term: Provided always, that if either of them should marry during the same term, the trustees were to pay to whichever of them should first marry the sum of £500 out of the said principal sum of £8000, or the investments thereof, for her own

V.-C. B. 1871 WEDGWOOD v. DENTON.

absolute use and benefit, free from the control of her husband. If, during the said term, either of them should have discontinued to occupy testatrix's present residence, but should, on the death of the other of them who should have resided therein up to the time of her decease, elect to take up her abode therein, she should be at liberty so to do, so long as she should keep the house, furniture, and effects in good order and repair, and she should thereupon, so long as aforesaid, be entitled to the aforesaid rent, dividends, interest, and annual produce during the residue of the said term. If both of them should die, or cease to occupy the house before the expiration of the said term for which the said house was held, the houses and the other specified property (including the £8000) were given upon trust for *Catherine Wedgwood*, a younger sister of the above-named *Mary M. A.* and *E. Wedgwood*, subject to the same conditions as to residence as were thereinbefore declared with regard to her sisters. And from and after the expiration of the said term for which testatrix's house was held, in case both or either of them (*M. A.* and *E. Wedgwood*) should have resided as aforesaid in the said house till the expiration of that term, similar provisions to those already set out were made in reference to the freehold house occupied by *James Denton*, and with which the furniture and effects in the testatrix's present residence, the carriage, horses, and pew, and also the £8000, were to be held. The trustees were also directed, from time to time, during the continuance of their trusts, to inspect and examine the state of the furniture and other effects, and cause such reparations and replacings to be made from time to time as they should think fit, such reparations and replacings to be made at the cost of the said *Mary Amery Wedgwood* and *Edith Wedgwood*, or of the said *Catherine Wedgwood*, or whichever of them should be then in possession or occupation of her said residence, yet so as that they should not be answerable for reasonable wear and tear thereof, nor be liable to repair or replace the carriage, horses, and things appertaining thereunto.

The residuary real and personal estate of the testatrix was given to *William Amery* and *Henry Coupland* upon certain trusts.

The house in which the testatrix resided was, at the date of her will, held by her under a lease from the Corporation of *Liverpool*,

dated the 29th of December, 1798, for the term (in the event which had happened) of the life of *Thomas Kay*, the survivor of the three lives named in the lease, and after the death of *Thomas Kay* for the further term of twenty-one years. *Thomas Kay* died in September, 1865, and the testatrix thereupon entered into an agreement with the corporation for the surrender of her existing lease, and the grant to her of a new lease. Accordingly, on the 1st of August, 1866, the corporation granted to the testatrix a new lease of the house in *Brownlow Street* for a term of seventy-five years. After the date of this lease the testatrix made two codicils to her will, not in any manner affecting the subject-matter of the suit, and on the 23rd of September, 1868, she died.

The main question in the suit, which was instituted for the administration of the testatrix's estate, was, whether, having regard to the surrender by the testatrix, after the date of her will, of the original term for which the house in which she resided was held, the conditions imposed by her will were discharged, or whether (as was contended by the trustees of the residue) the gift, being of a term which did not exist at her death, the new term not being disposed of by her will fell into the gift of the residue.

Mr. *Rigby*, for the Plaintiff *Mary Ann Wedgwood*, who had married since bill filed:—

Having regard to the very specific description of the term for which the house in *Brownlow Street* was held by the testatrix at the date of her will, the conditions of living in the house and remaining unmarried are limited to the duration of the then existing term, and cannot be applied to the new term or be extended indefinitely. She has imposed a condition which, by her own act in surrendering the term and accepting a new one, has become impossible, and therefore it is discharged, and the gift to *Mary Wedgwood* is to be taken as absolute and free from any condition. It is stated in *Swinburne* on Testaments (*Powell*) (1) that, "Howbeit, there be divers cases wherein the disposition is not void by reason of an impossible condition which the testator did account possible and lawful; but the condition itself is void, howsoever it seemed possible in the opinion of the testator. One is, where

(1) Page 402.

V.-C. B. 1871 WEDGWOOD v. DENTON.

the condition may be accomplished by some equivalent means, though not in the same manner, described in the disposition; another case is, where the testator, after the making of his will, understanding the condition to be impossible, did nevertheless confirm his will by codicils."

[He also cited *Gath* v. *Burton* (1), *Darley* v. *Langworthy* (2), and *Younge* v. *Furse* (3).]

Mr. *Kekewich*, for *Edith* and *Catherine Wedgwood*:—

The intention of the testatrix to pass her interest in her house in *Brownlow Street*, whatever it might be, is clear, and the fact that, by an event subsequent to the date of her will that interest has become enlarged, does not affect the disposition: *Cox* v. *Bennett* (4); *Castle* v. *Fox* (5).

Mr. *W. F. Robinson*, for the trustees of the residue:—

By the *Wills Act* (1 Vict. c. 26), the will is to be construed, with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testatrix; and as the will purports to dispose of a term which was not in existence at her death, the new term being undisposed of falls into the residue. If, however, it is decided that the new term passed by the will, the merely nominal impossibility of performing the condition is at an end. A new term is substituted, and the legatees can and must perform the conditions imposed by the testatrix. The case is distinguished from *Darley* v. *Langworthy*, where the testator had by his own act rendered performance of the conditions impossible.

[He cited *Emuss* v. *Smith* (6).]

Mr. *C. Stewart*, for other parties.

Mr. *Rigby*, in reply, referred to *Bullock* v. *Bennett* (7), *Violett* v. *Brookman* (8), and *Webb* v. *Byng* (9).

(1) 1 Beav. 478.
(2) 3 Bro. P. C. 359.
(3) 8 D. M. & G. 756. 3 Jur. N.S. 669.
(4) Law Rep. 6 Eq. 422.
(5) Law Rep. 11 Eq. 542.
(6) 2 De G. & Sm. 722.
(7) 1 K. & J. 315; 7 D. M. & G. 283.
(8) 26 L. J. (Ch.) 308.
(9) 1 K. & J. 580. 1 Jur. N.S. 697.

(7 H.C. 1 Jur. N.S. 443: 567.

SIR JAMES BACON, V.C.:—

Upon all these questions the only safe rule is, to consider carefully what are the intentions of the testatrix expressed in her will; and unless some overwhelming necessity intervenes to defeat the execution of those intentions, they must and ought to prevail. Now, the scheme of the will may seem whimsical, but it must be remembered that it is the will of a lady who is providing for members of her family, and providing for them by way of settlement. She is possessed of a certain leasehold interest in a house held under the Corporation of *Liverpool*, the term of which was for the life of *Thomas Kay* and twenty-one years after his death. By the provision in her will, as I read it, she intended that as long as that house lasted there should be house and home, and the means of occupying and enjoying it, for the persons whom she designates as the objects of her bounty; and she has, I think, described that in very distinct and apt terms. If I were to yield to Mr. *Rigby's* argument, I must wholly disappoint her intentions; I must make, as it were, a new will for her, and defeat the settlement which she has very carefully prepared. [His Honour, after stating the trust to permit *Mary Wedgwood* and *Edith Wedgwood* to reside in the house then occupied by the testatrix, and to use the furniture and other effects "during the remainder of the said term for which the house is held of the Corporation of *Liverpool* as aforesaid," continued:—] It has been contended that that is confined to the leasehold interest which she then possessed in the house, and that as soon as it happens, as it has happened, that she no longer holds that leasehold for the life of *Kay* and twenty-one years after his death, the term for which that house is held of the Corporation of *Liverpool* is expired and gone, and all that is subsequently provided in the will becomes of no effect. But, first, upon the words I find no necessity for arriving at that construction. The mention of the term of twenty-one years is descriptive, and is a very accurate description of the interest she had in the house; and when, further, she says they are to reside during the remainder of the term for which the house is held of the Corporation of *Liverpool*, why is it not as right to say that means the term of twenty-one years and *Kay's* life, as any other term that can be suggested. The words are fairly answered by putting that construction upon them. She

V.-C. B. 1871 WEDGWOOD v. DENTON.

knows that for *Kay's* life and for twenty-one years the house is hers to dispose of. That is the subject of which she makes a settlement, and for twenty-one years she endeavours to secure to her two nieces the house and home, and the income which she had provided for them. [His Honour, after referring to the subsequent provision, continued:—] I entirely go along with Mr. *Rigby's* argument upon the effect of the *Wills Act*. I do not ascribe to the codicils, or to the effect of the will, any more than he has insisted upon, excepting only this, that the codicil has the effect of a republication of the will, and is to give it the effect of being read so far as the property intended to be dealt with by the testatrix is concerned, as if it were made immediately before her death. But that does not affect this case in the slightest degree. The only event that has happened which is said to affect the construction of the will is, that some time after the date of her will she surrendered the lease which she then had and procured the grant of another, so that at the time of her death, and at the time of her republication of her will and confirmation of it by the codicil, she did hold a lease of the particular house from the Corporation of *Liverpool*, and although the term had been expanded—enlarged by her act—the nature of her property in the house was not in the least degree affected by that, as far as the description goes; but she had it, and it was hers to deal with, whether she thought fit to deal with it for the new lease of seventy-five years or for that term of twenty-one years, which was the main object of her contemplations as to this part of the case, when she provided that house and home for her nieces in succession, on the conditions mentioned by her. The cases referred to by Mr. *Rigby* in his very able argument were cases in which it was impossible for the conditions to be performed. It was ingeniously attempted to avoid the difficulty arising from that by insisting that the condition was discharged—not that it had become impossible.

But, on examining the cases cited, the impossibility of performing the condition was of the very essence, and to change that by calling it "the discharge of the condition" does not alter the subject or throw any light upon it; it is only applying another term to the same thing. In *Darley* v. *Langworthy* (1) the lady was to have had

(1) 3 Bro. P. C. 359.

the enjoyment of a mansion-house and furniture in it, and certain leaseholds, and then by the act of the testator it became impossible that that condition could be performed, and it was held that it was only so far discharged as it had become impossible. So in *Gath* v. *Burton* (1), where a testator gave to his debtor certain benefits under his will on condition that he paid the debt, and after that the condition became incapable of performance, because by a transaction between testator and his debtor in his lifetime the debt had been extinguished and ceased to exist. Debt there was none, as the testator, by accepting a composition, released the debt, and therefore it had become wholly impossible to perform the condition. But where is the impossibility of performing literally and strictly and completely every condition in this will? It may be in events which may hereafter occur, and upon which I need not now speculate, that at the end of that term of twenty-one years so plainly pointed out in the will, the time will come when it is to be ascertained what interest *Mary Wedgwood* takes in the capital, what interest *Edith Wedgwood* takes, and, if neither of them takes any, what interest *Catherine* takes? I cannot now decide that, but I can, and am bound, I think, to decide that the direction in the will is clear and explicit in itself, and that at least for the period which existed of that term of twenty-one years the trusts of the will are to be in active operation.

Mary, who is married, is entitled to the £500. *Edith*, who is not yet married, upon condition that she keeps up the house and resides in it, will be entitled to the income of all the rest. At the end of the term of twenty-one years, questions may arise which cannot now be decided, as to what is to be done with the corpus of the aggregate settled fund which the testatrix has provided for the benefit of her nieces. Beyond that I do not know that I can go at present. It will be declared that the Plaintiff is entitled to the sum of £500, and that the trusts in the will are subsisting trusts for the period of twenty-one years from the death of *Thomas Kay*.

Mr. *Robinson*:—I am afraid, if we took it exactly in that form, it might be contended at some future time that it was an expression

(1) 1 Beav. 478.

V.-C. B. 1871 WEDGWOOD v. DENTON.

of your Honour's opinion that it was not a continuing trust beyond that time.

The VICE-CHANCELLOR:—I cannot help that. If anybody says that, and you are there, you will contradict him.

Solicitors: Messrs. *Field, Roscoe, & Co.*, for Messrs. *Eden, Pears, Logan, & Eden, Liverpool.*

V.-C. B. 1871 *June* 22.

BRUNEL *v.* BRUNEL.

Domicil.

A French subject, by establishing himself in business in this country, marrying, and continuing to reside here for more than thirty years, making only occasional business visits to *France*:—

Held, to have lost his domicil of origin, and acquired an English domicil, notwithstanding his refusal to take out letters of naturalisation in this country, on the ground that he might return to *France*, and would not give up his *status* as a French citizen.

THE question in this case was as to the domicil at the date of his death, the 19th of September, 1868, of the intestate *Jean François Brunel.*

It appeared that *J. F. Brunel* was born in *France*, of French parents, about 1790. Between 1815 and 1830 he spent a considerable portion of his time in this country, but without having any fixed residence. In 1833 he left *France* voluntarily, and took up his permanent residence in this country, and his sole place of abode and business down to his death was in *London* or the immediate neighbourhood. In 1846 he married the Plaintiff, who was an Englishwoman, carrying on business as a milliner in *Woodstock Street.* There was only one child of the marriage, the Defendant, who was blind from her birth, and of weak understanding.

Mr. and Mrs. *Brunel* continued to reside in *Woodstock Street* until 1865; when, at his request, the business was sold, and they took a house at *Dalston*, for a term of three years, from Michaelmas, 1865, with the option of taking a lease of the house for a longer time. It appeared that he expended a considerable sum of money

about the garden of this house, and that shortly before his death, when the three years' term was about to expire, he was in treaty for a lease for a further term of fourteen years. Evidence was also given that he frequently spoke of ending his days there. Until about 1865 *Brunel* carried on business in *Margaret Street* as a wine merchant, agent for the *Vichy Water Company*, and bill discounter. In 1858 he bought a family grave in *Highgate Cemetery*, on which he had inscribed "The Family Grave of *J. F.* and *Elizabeth Brunel*," the site having been selected by *Brunel* after a personal visit to the spot. In 1861 he took a lease of his residence in *Woodstock Street* for a term of twenty-one years from Christmas, 1860, and also, in the same year, took an assignment of a ninety-seven years' lease of a house in *Highbury Grove*. It appeared that on the purchase of this lease his solicitor explained to him that he could not legally hold the lease unless he became naturalised. The intestate in reply stated distinctly that he would not give up or surrender his citizenship of *Paris;* that he was a Frenchman, and might return to reside in *France*, and that he consequently declined to become a naturalised British subject. In 1864 *Brunel* took a lease for thirty-nine years of the *Margaret Street* premises, where his business was carried on, and afterwards granted an underlease of the premises to *Gallais*, who had purchased the business from him.

The intestate was commonly known and described as *John Francis*, or *Francis Brunel*, and used to sign his name in this manner. He was in the habit of making occasional visits (about three or four times a year) to *France* for the purposes of his business, and in order to see his friends and relations. On the last of these visits, in August, 1868, he was taken ill at *Dunkirk*, and returned to *England* on the 29th of August. After his return home, and during his illness, when there was no ground for serious apprehension, the intestate stated to his wife and medical attendant that he never intended to go to *France* again.

He died intestate on the 19th of September, 1868, and was buried in the grave purchased by him in *Highgate Cemetery*.

Letters of administration were granted to his widow, and the bill was filed for the purpose of obtaining the declaration of the Court as to his domicil.

V.-C. B. 1871 BRUNEL v. BRUNEL.

In addition to the facts already stated, the Plaintiff, in her affidavit, said that frequently during her marriage with the intestate she had heard him say that he should never return to *France* to reside, as the English climate suited him much better.

An affidavit had been made by a French advocate, M. *de Rosaz*, stating, that by the 17th Article of the *Code Napoléon* it was enacted, that the quality of a Frenchman shall be lost:—"1. By naturalisation in a foreign country. 2. By accepting, without the authority of government, public employments bestowed by a foreign power. 3. By adoption into any foreign corporation which shall require distinctions of birth (1). 4. In short, by any settlement made in a foreign country without intention to return. Commercial establishments shall never be considered to have been made without intention to return."

Under this article M. *de Rosaz* was of opinion that if the intestate took up a permanent residence in *England* without any intention of returning to *France*, he thereby lost his *status* as a Frenchman, and ceased to be a citizen of *Paris*.

Mr. *Willcock*, Q.C., and Mr. *W. Barber*, for the Plaintiff, contended that the domicil of the intestate was English; there having been that change of residence of a permanent character voluntarily assumed which is sufficient in order to affect a change of domicil: *Haldane* v. *Eckford* (2); *Udny* v. *Udny* (3).

Mr. *Street*, for the Defendant:—

Residence and domicil are two perfectly distinct things. Residence not accompanied by the present intention that it is to be permanent and perpetual does not constitute domicil, even if by accident it continues for a long time and is not merely transient: *Savigny* on Private International Law (*Guthrie*) (4). The distinction is expressly recognised by 24 & 25 Vict. c. 121. In order to effect a change of domicil there must be not only a change of residence, but an intention to abandon the original, and

(1) Clause 3, which is in the original, "*Par l'affiliation à toute corporation étrangère qui exigera des distinctions de naissance*," though contained in the original edition of 1804, appears to have been suppressed in that of 1807, and not to have been re-enacted.

(2) Law Rep. 8 Eq. 631.

(3) Ibid. 1 H. L., Sc. 441.

(4) Page 55.

acquire a new domicil, and those who assert that the birth-domicil was changed are bound to prove that such change took place. In the face of the express declaration by the intestate that he was a Frenchman, and might return to reside in *France*, and did not wish to lose his *status* as a French citizen, his permanent residence in this country is not sufficient to divest him of his French domicil and give him an English one: *Bell* v. *Kennedy* (1); *Somerville* v. *Somerville* (2); *Hodgson* v. *De Beauchesne* (3); *Moorhouse* v. *Lord* (4).

SIR JAMES BACON, V.C.:—

On the facts of this case I have no doubt that the domicil of the deceased was in *England*. The French advocate who has made an affidavit on behalf of the Defendant points out distinctly the circumstances under which, according to the *Code Napoléon*, a French domicil may be lost, and I am of opinion that it was lost in this case. To effect a change of domicil it is not necessary to obtain letters of naturalisation. A permanent residence by a foreigner in this country with no intention of ever returning to his native country will be sufficient to create a domicil in this country. *Udny* v. *Udny* (5) cuts down, or rather explains, the expressions in *Moorhouse* v. *Lord*, that for a change of national domicil there must be a definite and effectual change of nationality, that a man must intend *exuere patriam*;—and I adopt what was said by Lord *Westbury* in *Udny* v. *Udny* (6): "It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicil is established." It must be declared, in the terms of the prayer, that the domicil of the intestate at his death was English.

Solicitors: Mr. *W. W. Comins*; Mr. *W. B. Brook*.

(1) Law Rep. 1 H. L., Sc. 307.
(2) 5 Ves. 750, 787.
(3) 12 Moo. P. C. 285.
(4) 10 H. L. C. 272.
(5) Law Rep. 1 H. L., Sc. 441.
(6) Ibid. 458.

V.-C. B.

1871

April 22; *May* 6.

In re HILL'S TRUSTS.

Will—Construction—Tenant for Life—Residuary Bequest—Period of Distribution—Survivorship—Death leaving Issue—When Contingency to be determined.

9 Cl & F 391
4 H L 412-3,

Testator gave a sum of stock to trustees, upon trust to pay the dividends to his wife during her life or widowhood; but should she marry again, he directed that the dividends should "cease," and fall into his residue. Afterwards, "as to the rest, residue, and remainder" of his estate and effects, he gave and disposed thereof to his four sons, naming them, "with benefit of survivorship, unless they shall die leaving issue; and then my meaning is, that the said property shall go to his or their issue, and to be paid to them at their respectively attaining the age of twenty-one years":—

Held, that the disposition of the sum of stock, after the death of the tenant for life, was reversionary, and not like that of the rest of the residue, immediate; and that the proviso, "with benefit of survivorship," followed by the condition "unless they shall die leaving issue," must be referred as to the same sum of stock to survivorship and death leaving issue in the lifetime of the tenant for life, and not generally; and hence that the sons who survived the tenant for life took absolute interests, though they had issue living.

PETITION.

John Wilkes Hill died on the 5th of May, 1843, having by will, dated the 25th of January, 1843, bequeathed to *John Hill* and *Frederick Westley*, and the survivors of them, and the executors, administrators, and assigns of such survivor, and to any subsequently to be appointed trustees, a sum of £4000 New 3½ per Cent. Annuities, upon trust to pay the dividends to his wife *Anne Hill*, or to her appointment, during her life or widowhood; but should she marry again, he directed that "the said dividends" should "cease" from the time of her second marriage, and fall into and become part of the residue of his estate; "and in lieu thereof and the said dividends," the testator gave to his wife the sum of £500 absolutely. After certain specific devises and bequests, testator proceeded as follows:—

"And as to the rest, residue, and remainder of my estate and effects, I give and dispose thereof between my four sons, namely, *John Hill*, *William Hill*, *Hammett Hill*, and *Henry Hill*, share and share alike, with benefit of survivorship, unless they shall die leaving issue; and then my meaning is, that the said property

shall go to his or their issue, and to be paid to them at their respectively attaining the age of twenty-one years."

In February, 1851, *Frederick Westley* died, and by a deed dated the 6th of May, 1851, the above-named *William Hill* was appointed a trustee of the will in his place.

In 1854 *William Hill* and his then partner in business were adjudicated bankrupts, and *William Nicolson* was appointed creditors' assignee.

In January, 1867, he was again adjudicated a bankrupt, and an official assignee only, *Edward Watkin Edwards*, was appointed. No dividend was ever paid under either bankruptcy.

On the 12th of September, 1867, *Henry Hill* died, leaving a widow, *Caroline Hill*, and a daughter, *Caroline Mary Hill*.

On the 23rd of March, 1870, *Anne Hill*, the widow, died, not having been again married, and thereupon the £4000 stock became distributable under the trusts of the will.

All this time *John Hill* was living, having two children of full age; *William Hill* was living, having two children, infants; *Hammett Hill* was living in *Canada*, having three children, of whom two were infants; and *Caroline Mary Hill* was living, being of the age of twenty-three or thereabouts.

The Petition was presented by *John Hill*, stating the above facts, and that in November, 1870, the trustees had transferred the £4000 stock into Court; submitting that, according to the true construction of the will, the Petitioner was entitled to one-fourth of the fund; and praying that one-fourth of the residue of the fund, after payment of costs, might be transferred to the Petitioner, and the other three-fourths to the parties respectively entitled thereto.

The Respondents were *William Hill*, *William Nicolson*, *Edward W. Edwards*, *Caroline M. Hill*, *Caroline*, widow and administratrix of *Henry Hill*, *Hammett Hill*, the children of *John Hill*, the children of *William Hill*, and the children of *Hammett Hill*.

Subsequently to the Petition first coming on to be heard, the second bankruptcy of the Respondent *William Hill* was annulled.

Mr. *Maidlow*, for the Petitioner:—

The question is, whether the words, "with benefit of survivorship unless they shall die leaving issue," import a survivorship

V.-C. B. 1871 *In re* HILL'S TRUSTS.

and a dying leaving issue in the lifetime of the tenant for life, or generally.

For the Petitioners it is contended that survivorship and death leaving issue in the lifetime of the tenant for life, are all that was meant, and hence that *John Hill*, having survived the tenant for life, is entitled absolutely, though he has issue; according to the fourth of the four rules laid down in *Edwards* v. *Edwards* (1).

The reasoning of the Lord Chancellor, in the judgment in *Bowers* v. *Bowers* (2), applies to this case. There the gift was immediate, whereas here it is reversionary; but there the words "with benefit of survivorship," occurred, as they do here; and the general rule is supported (3), "that the survivorship is to be referred, according to the doctrine of *Cripps* v. *Wolcott* (4), to the period of distribution;" that is, in this instance, to the death of the tenant for life. *Edwards* v. *Edwards* also was approved in the same case (5).

In *Bowers* v. *Bowers*, the decision of Vice-Chancellor *Malins* was reversed, on the ground that the gift, which would otherwise have been absolute, was qualified by a subsequent proviso, beginning with the words, "and in case any of my said children should die . . ." It will be argued that the passage in this clause, commencing with the words, "unless they shall die leaving issue, . . ." has a like operation. But it is contended that this passage is only a sub-proviso, qualifying the preceding proviso, "with benefit of survivorship," and not interfering with the application of the general doctrine, that the whole limitation is to be referred to the period of distribution, *i. e.*, to the death of the tenant for life.

This view is supported by *In re Allen's Estate* (6), *Cooper* v. *Cooper* (7), *Ware* v. *Watson* (8), and *Dean* v. *Handley* (9).

Mr. *Jones-Bateman*, for *William Hill*:—

I support the same contention.

The assignee under the first bankruptcy has been served, but has made no claim, and does not appear.

(1) 15 Beav. 357.
(2) Law Rep. 5 Ch. 244.
(3) Ibid. 247.
(4) 4 Madd. 11.
(5) Law Rep. 5 Ch. 251.
(6) 3 Drew. 380.
(7) 1 K. & J. 658.
(8) 7 D. M. & G. 248.
(9) 2 H. & M. 635.

The second bankruptcy has been annulled.

On the question of construction, additional authorities are *Barker* v. *Cocks* (1) and *Davenport* v. *Bishopp* (2).

Mr. *Stallard*, for *Caroline Hill* and *Hammett Hill*:—

The widow makes no claim against her daughter.

On behalf of *Hammett Hill*, I support the same contention: *In re Gregson's Trusts* (3).

Mr. *Cookson*, for *Caroline Mary*, daughter of *Henry Hill*, deceased:—

If in this case there had been an immediate gift, as in the first rule in *Edwards* v. *Edwards* (4), it might have been held that, as *Henry Hill* survived the testator, he took an absolute interest, which has now passed to his widow and representative. But the interposition of the life estate with regard to this sum of stock makes all the difference. Practically, there is no contest between us; but, according to the true construction, the daughter is now entitled.

In anticipation of the arguments on the other side, I contend that the words "the said property," must mean the parent's share.

Where a life estate is given in part only of the residue, that the fourth rule in *Edwards* v. *Edwards* applies to such part, appears from *Dean* v. *Handley* (5).

Mr. *Edward Hanson*, for the children of *John*, and the children of *Hammett Hill*:—

In the events that have happened, *John Hill* and *Hammett Hill* take life interests only, with remainder to their children respectively.

The clause has been treated as if it applied to this legacy of £4000 stock only. In truth, it applies to all the residue; hence to property which is given immediately in possession, without any interposed life estate. The disposition of the £4000 legacy must consequently be the same as if it had been given without any previous life estate: *Bowers* v. *Bowers* (6), *Cooper* v. *Cooper* (7),

(1) 6 Beav. 82.
(2) 2 Y. & C. Ch. 463.
(3) 34 L. J. (Ch.) 41.
(4) 15 Beav. 357.
(5) 2 H. & M. 635.
(6) Law Rep. 5 Ch. 244.
(7) 1 K. & J. 658.

V.-C. B. 1871 *In re* HILL'S TRUSTS.

and the second (not the fourth) rule in *Edwards* v. *Edwards* (1), have direct application, and govern the present.

The use of the word "property" shews that the testator was dealing with all the residue, and not with this fund only.

If it be held otherwise, the Court must adopt one principle of construction with regard to one part of the residue, and another with regard to another. In *Dean* v. *Handley* (2) it will be found that although a life estate was given in a portion only of the income, the rest of the income was directed to be accumulated. There was, as the Lord Chancellor says (3), "a disposition affecting the whole income during life," which distinguishes the case from the present.

The contingency expressed by "unless they shall die leaving issue," is more extensive than the proviso "with benefit of survivorship," hence it cannot be treated as a sub-proviso. It is, in truth, a substantive limitation, as in *Bowers* v. *Bowers* (4).

Smith v. *Streatfield* (5) shews that the division between the children must be *per capita*, and not *per stirpes*. The word "respectively" does not occur.

Mr. *H. B. Miller*, for the assignee under the second bankruptcy, asked for his costs of appearance, prior to the annulment.

Mr. *Bunting*, for the children of *William Hill*:—

This case goes beyond anything that was decided in *Edwards* v. *Edwards*. Here the gift is to the widow during widowhood, with remainder to each of the sons, followed by a limitation depending on a double event, *i. e.*, if a son dies without leaving children, the income is to go to the survivors, and after the death of the survivor of them, the fund is to go to all the children in equal shares; if a son dies leaving issue, his share is to go to all the children of all the sons who shall leave children. Thus the case is brought within *Bowers* v. *Bowers*.

In *In re Allen's Estate* (6) and *Dean* v. *Handley* the whole fund was given over on determination of a prior life estate. Hence they do not apply to this case.

(1) 15 Beav. 357.
(2) 2 H. & M. 635.
(3) Ibid. 639.
(4) Law Rep. 5 Ch. 244.
(5) 1 Mer. 358.
(6) 3 Drew. 380.

This gift is like an immediate gift of property, of which the testator was possessed only in reversion. The whole of the residue must be treated as if disposed of in bulk.

SIR JAMES BACON, V.C.:—

Several suggestions have been offered as to the proper construction of this will, but I must say I regard the question as scarcely arguable.

Nothing can be plainer than the words in question; nothing can be more direct and free from doubt than their construction, if taken without reference to the decisions, which in questions of construction are not always satisfactory or consistent.

The testator takes a sum of £4000 stock out of his property; he makes a specific thing of it, gives it to his widow for life, and then directs that when she dies the specific thing shall fall into his residue. In a subsequent part of the will he disposes of that residue. How can the circumstance that he afterwards disposes of his residue affect the fact that this £4000 legacy is a specific thing, which he sets apart for a time, and which he directs shall fall into his residue at a future period not then ascertainable? It is a portion made distinct from all the rest of his property, and the terms in which he disposes of it are as plain as possible. It is as if he had said: "And as to the said sum of £4000 stock, from and after the decease or second marriage of my said wife, I give and dispose thereof between my four sons, namely, *John Hill*, *William Hill*, *Hammett Hill*, and *Henry Hill*, share and share alike."

Then he proceeds to add, "with benefit of survivorship;" and if these had been the only additional words—if the clause had stopped there—a difficult question might have been raised. But there is a condition annexed. The testator, foreseeing that at the death of the tenant for life the four sons might not be living, proceeds to say: "Unless they shall die leaving issue; and then my meaning is, that the said property shall go to his or their issue, and to be paid to them at their respectively attaining the age of twenty-one years." Is it possible for words to express a testator's meaning more clearly? Upon the death of the tenant for life the legacy is to fall into the residue, and be at once distributed. It is

V.-C. B. 1871 *In re* HILL'S TRUSTS.

to be divided into four shares if the four sons shall be then living, and there an end. If either or any of them shall be dead without leaving issue, the fund is to go to the survivors. If either or any shall be dead leaving issue, the share of him or them so dying is to go to his or their respective issue.

The notion that because the word "respectively" is not to be found in the clause, the fund is to go amongst all the children *per capita*, is quite unfounded.

The difference between the case of *Bowers* v. *Bowers* (1) is apparent. Where no period other than the death of the testator is specified or indicated, the death of the testator is to be taken as the period of distribution. Here the period of distribution is the death of the tenant for life.

The rule laid down in *Edwards* v. *Edwards* (2) is, if I may be allowed to say so, a very sound and wholesome rule; and the Master of the Rolls does not decide that case without stating very good reasons for his decision. Nor, if the question were *res integra*, would there be the slightest difference in the conclusion at which I should have arrived. I consider it settled that, in the absence of words to the contrary, the rule is that the words "if they shall die leaving issue" mean if they shall die leaving issue before the period of distribution; and in this instance it is impossible to doubt that the testator meant to fix the death of the tenant for life as the period at which the rights of the parties were to be ascertained.

My only doubt is as to the claim of the assignee.

The order will be in accordance with the prayer of the Petition; but as to the share of *William Hill*, I shall allow the order to be suspended for a week, to give the assignee an opportunity of making a claim, if he shall be so advised.

Solicitors: Messrs. *Mason & Taylor;* Mr. *Anthony Carr;* Mr. *W. W. Aldridge.*

(1) Law Rep. 5 Ch. 244. (2) 15 Beav. 357.

WYMAN *v.* CARTER.

V.-C. B.
1871
May 25.

Vendor and Purchaser—Legal Estate—Leaseholds—Will—Devise in Trust—Disclaimer by Trustees—Administrator with Will annexed—Declaration and Order for Sale.

Testator bequeathed leaseholds to trustees, upon trust to pay the rents and observe the covenants, and subject thereto, during the life of his wife, to pay the rents unto and equally amongst all his nephews and nieces (naming eleven persons) who should be living, and the children of such as should be dead, in equal shares as tenants in common; and after her death, to divide the rents into three equal parts, and pay one part to each of his three nieces (naming three of the persons before named) for life; after the decease of each, the capital of the third to be in trust for her children; if either should die without leaving a child surviving, the share to be held in trust for the nephews and nieces then living, and the children of those then dead. He bequeathed the residue to all his nephews and nieces who should be living at his decease, and the children of such of them as should be dead, in equal shares. The will contained a power to the trustees to sell "if and when they shall think fit so to do, for the purpose of division or distribution."

The two surviving trustees, who were also appointed executors, renounced and disclaimed, and administration with the will annexed was taken out by one of the nephews.

The debts having been all paid, a bill was filed by another nephew, to which the administrator and the other beneficiaries were parties, for administration; and in this suit a decree was made, declaring that the share of a niece, who had died in the testator's lifetime without issue, had passed to the other nephews and nieces, and ordering a sale of the leaseholds:—

Held, that the legal estate in the leaseholds was in the administrator, and that it was not necessary that the beneficiaries should join in the conveyance to a purchaser.

ADJOURNED SUMMONS.

Thomas Swales, the testator in the cause, by his will, dated the 11th day of August, 1851, gave and bequeathed unto *William Caston*, *Robert Tilling*, and *Richard Elms*, their executors, administrators, and assigns, all his leasehold messuages, tenements, and hereditaments, upon trust, "in the first place, to pay the rents, taxes, and outgoings chargeable thereon respectively, and to observe and perform the covenants and conditions in the respective leases of the same messuages, tenements, and hereditaments contained, and on the part of the lessee, his executors, administrators, and assigns, to be observed and performed, and to keep my

V.-C. B. 1871 WYMAN v. CARTER.

general estate harmless and indemnified therefrom, and from all actions, suits, accounts, reckonings, claims, and demands whatsoever in respect of the same;" and subject thereto, as to the messuages or tenements, Nos. 10 and 11, *Grove Terrace*, and Nos. 7 and 8, *Capland Street, Lisson Grove*, in the parish of *St. Marylebone, Middlesex*, upon trust, during the life of his wife, to pay the rents, issues, and profits thereof, after payment thereout of all outgoings "as aforesaid," unto and equally between such of all his thereinbefore-named nephews and nieces (namely, *William Carter, Thomas Wilmore, Lucy Cock, Mary Caston, Hannah Leverett, Sophia Mayes, Mary Carter, Elizabeth Wyman, Ann Elms, Dinah Swales*, and *Elizabeth Swales*) as should be then living, and the children of such of them as should be then dead, in equal shares as tenants in common, such child or children to have the parent's share only, and the shares of such of the last-mentioned persons as should be married women to be for their sole and separate use; and from and after the decease of his wife, upon trust to divide the surplus rents and profits into three equal parts or shares, and to pay one of such third parts unto each of them his said nieces *Lucy Cock*, *Mary Caston*, and *Hannah Leverett* for life, for her separate use; and after the decease of each of them, as to the third, the rents of which would have been payable to her if she had continued to live, upon trust for all and every the children or child of the niece so dying who should be living at her decease, if more than one in equal shares as tenants in common; and if either of his three lastly-named nieces should die without leaving any child her surviving, then as to as well an original as an accrued share, upon trust for such of his nephews and nieces as should be living at the decease of such of his said nieces as should so die, and the child or children of such of them as should be then dead, in equal shares as tenants in common, such child or children to have the parent's share only, and the shares of such of them as should be married women to be for their sole and separate use. As to the residue of his real and personal estate, the testator devised and bequeathed the same unto and amongst all his said several nephews and nieces who should be living at his decease, and the children of such of them as should be then dead, in equal shares, such child and children to take the parent's share only,

and the shares of such of them as should be married women to be for their sole and separate use. The will contained a declaration that it should be lawful for the trustee or trustees for the time being of the will, "if and when they or he shall think fit so to do for the purpose of division or distribution," to sell the whole or any or either of the aforesaid messuages, tenements, and hereditaments.

On the 22nd of September, 1854, the testator made a codicil to his will, whereby he revoked the appointment of *Richard Elms* as executor, and appointed *William Henry Papworth Walsh* to be an executor with *Caston* and *Tilling*. He also revoked the bequest in trust to *Caston, Tilling*, and *Elms*, and made a bequest of the same hereditaments to *Caston, Tilling*, and *Walsh* on the same trusts and in the same manner as if *Walsh* had been originally nominated and appointed an executor and trustee.

In October, 1854, *Lucy Cock* died without leaving issue.

Previously to the 30th of November, 1857, *William Caston* died, and by a codicil of that date the testator bequeathed a leasehold messuage which he had acquired since the date of his will to *Tilling* and *Walsh* upon certain trusts. He then gave a pecuniary legacy; and in all other respects confirmed his will and first codicil.

The testator died on the 2nd of December, 1857, leaving surviving him his widow and ten of the eleven nephews and nieces mentioned in the will, *Lucy Cock* having died, as above stated.

Tilling and *Walsh*, the surviving executors, renounced probate; and they never accepted or acted in the trusts of the will and codicils.

On the 8th of January, 1858, administration with the will annexed was granted to *William Carter*.

By an indenture dated the 19th of July, 1858, and made between the surviving nephews and nieces of the first part, the husbands of such of the nieces as were married of the second part, *William Carter*, as administrator, of the third part, and *Charles Hird* and *Charles William Hird* of the fourth part, the two last-named persons were appointed receivers of the leasehold premises.

On the 2nd of January, 1863, *Elizabeth Wyman*, one of the nieces, died, leaving her husband *James Wyman*, who became her

V.-C. B. 1871 WYMAN v. CARTER.

legal personal representative, and one daughter, *Louisa Ann*, wife of *Walter Henry Croxford*, surviving.

On the 2nd of June, 1866, the testator's widow died.

On the 3rd of July, 1867, the bill was filed by *James Wyman* against the nine surviving nephews and nieces (amongst whom was the administrator, *William Carter*), the husbands of the married nieces, and Mr. and Mrs. *Croxford*, stating, amongst other things, that *William Carter*, as administrator, had paid the funeral and testamentary expenses, debts, and legacies out of the personal estate, and that "he assented to the several specific and residuary bequests contained in the said will and codicils;" and praying for administration of the personal estate, and for a declaration of the rights and interests of the Plaintiff, and the nephews and nieces of the testator in the leaseholds and residuary estate; and other consequential relief.

William Carter, the administrator, by his answer admitted that all the debts were paid, and did not deny that, but submitted whether he had assented.

In this suit a decree was made on the 8th of February, 1870, whereby it was (amongst other things) declared that, by reason of the death of *Lucy Cock* without issue in the lifetime of the testator, one equal third part or share of the leasehold premises, Nos. 10 and 11, *Grove Terrace*, and Nos. 7 and 8, *Capland Street*, and of the rents and profits thereof, became, on the 2nd of June, 1866, divisible in equal shares between the nine surviving nephews and nieces (naming them) and the Plaintiff, as legal personal representative of *Elizabeth Wyman*. It was also ordered that the leaseholds should be sold.

Under this decree the property was put up for sale under conditions, the 13th of which provided "that the purchaser shall not require for any purpose the concurrence of any person in respect of any beneficial interest bound by the decree or order for sale."

At the sale, Lots 1, 2, 3, and 4, which comprised Nos. 7 and 8, *Capland Street*, and Nos. 10 and 11, *Grove Terrace*, were purchased by a Mr. *Solomon Willott*; and on his behalf the following requisition was made:—

"The whole of the beneficial interest is apparently bound by the order for sale, and the condition points to a sale by trustees under

some trust or power for that purpose. But no such persons appear on the title. Of the trustees for sale under Mr. *Swales'* will, one is dead, and the remainder have renounced, and it is impossible that the administrator with the will annexed can execute the power contained in that will. It further appears from the statement in the bill that the testator's debts have long since been paid, and that the administrator has assented to the bequests, so that no sale can be made by him as administrator. Have new trustees been appointed in the suit, or who will assign the property?"

To this it was answered, on behalf of the vendor, as follows:—

"The administrator with the will annexed is the party to convey. New trustees have not been appointed. The legal bequest failed. The beneficiaries were all parties to the suit, and none of them objected to the decree for sale, which was the best mode of distributing the property, and warranted, not merely by the parties desiring a sale, but by the frame of the will, which contemplated a sale if it should be expedient for the purpose of distribution, which it unquestionably was, considering the number of persons interested. Any one of the beneficiaries might, at the date of the decree, have had a sale granted, having regard to the *Partition Act*, 1868, if the Court had not otherwise jurisdiction, which it had."

To this it was replied, on behalf of the purchaser:—

"The administrator with the will annexed cannot convey, inasmuch as the legal estate is no longer vested in him, and he has no power of sale. The legal bequest did not fail, inasmuch as the legatees are an existing and numerous class. We admit that the beneficial interest is bound, but we insist that we are entitled to the legal estate. We do not see what the *Partition Act* has to do with the matter, inasmuch as up to the present time no order under that Act has been made in the suit. Either new trustees must be appointed for the purpose of the conveyance, or a vesting order must be obtained; and in either case at the vendor's expense. Until this is done, no sufficient title is shewn by the abstract, and the purchaser must again reserve further requisitions."

In the result, the objection was not removed, and the purchaser

V.-C. B. 1871 WYMAN v. CARTER.

refused to complete; and on the 24th of November, 1870, the Plaintiff's solicitor took out a summons that the purchaser might be ordered to pay the balance of the purchase-money into Court to the credit of the cause, with £5 per cent. interest from the 5th of August, 1870.

The summons was adjourned into Court.

Mr. *Kay*, Q.C., and Mr. *W. R. Ellis*, for the Plaintiff:—

From the frame of the will, it is quite clear that the testator meant the legal estate to remain in the trustees until the final distribution of the property took place. The actual trustees having disclaimed, and administration having been granted to *William Carter*, our contention is, that the legal estate and power of sale are vested in him.

But for the power of sale, the Court could not have ordered a sale of the property. The order necessarily implies that the power of sale is subsisting and in the administrator.

Mr. *Ince*, for the Defendants.

Mr. *Decimus Sturges*, for the purchaser:—

The legal estate in the leaseholds stands in a peculiar position. Either the specific gift failed, in which case the estate fell into the residue; or, if it did vest in the administrator, it has by his assent passed out of him (no conveyance being necessary—an administrator, for example, never conveys to next of kin), and is now in the beneficiaries. In either case, it is not in the administrator.

The decree of the 8th of February, 1870, shews that the share of *Lucy Cock*, who died in the testator's lifetime, fell into the residue. So, again, the same decree shews that *Elizabeth Wyman's* share of it passed to her personal representative, which would not have happened, except on the theory that the share fell into the residue.

Where a trustee and executor renounces and disclaims, an administrator with the will annexed is not a trustee of the will: *Lewin* on Trusts (1). The power of sale, in this instance, is discretionary, and cannot be delegated.

(1) 5th Ed. pp. 168, 169.

The Court itself has no power to sell. The only object of a sale as authorized by the will, was for the purpose of division or distribution; but division cannot be made, inasmuch as there are persons living who are in enjoyment of the rents in specie during their lives; and the period of distribution has not arrived.

As to the costs: If the purchaser's objection is valid, and the beneficiaries must join, he is entitled to his costs, charges, and expenses; if wrong, his objection not being unreasonable, he ought to have his costs; and at least ought not to be compelled to pay costs: *Dart* on Vendors and Purchasers (1).

SIR JAMES BACON, V.C.:—

I have listened with much attention to the arguments that have been advanced on behalf of the purchaser, but I do not think that he is justified in the contention which he has raised.

For my part, I entertain no doubt as to where the legal estate is. The trustees having disclaimed, the legal estate must vest in the administrator. It is in that character only, as having the legal estate in him, that the administrator was made a party to this suit separately from the other beneficiaries, and was interrogated as to his assent to the legacies.

The purchaser has, in my opinion, been far too scrupulous. I acquit him of all improper motive; but it is in consequence of his scruples, which I hold to be unfounded, that the additional expense has been occasioned; and common justice requires that he alone should pay the costs of the parties appearing here. He must pay the balance of the purchase-money into Court, and must pay the costs of this summons of the Defendants (if they have been served) as well as of the Plaintiff.

Solicitors for the Plaintiff: Messrs. *Lydall & Sweeting.*
Solicitors for the Defendants: Messrs. *Hird & Son.*
Solicitors for the Purchaser: Messrs. *Gray & Berry.*

(1) 4th Ed. p. 1096.

V.-C. W.

1871

May 26.

In re OWEN'S TRUSTS.

Will—Construction—Gift to A. and her Children—Life Estate implied in the Mother, with Remainder to Children.

Post 434.
7 Ch 255

A testatrix gave £1400 to trustees in trust to pay the income to *M.* for life, and the capital to her children (excluding her two eldest sons) who should survive her and attain twenty-one. She also gave £1500 to each of her two eldest sons, and the residue to *M.* and such of her children, including the two eldest sons, as should attain twenty-one:—

Held, that *M.* took a life estate in the residue, with remainder to such of her children as should attain twenty-one.

MARY OWEN, by her will, dated the 21st of August, 1863, after directing payment of her debts, funeral and testamentary expenses, and giving certain pecuniary legacies, gave £1400 to her trustees, upon trust to invest the same and to pay the interest thereof to her adopted child *Margaret Hewett* for life, for her separate use, and from and after her decease upon trust to hold the same, and the annual income thereof, in trust for such of her children (exclusive of her two eldest sons thereinafter named and provided for) as should survive her, and who should then have attained or should afterwards live to attain the age of twenty-one years, whether sons or daughters, in equal shares and proportions, for their respective own absolute use. And she bequeathed to the two elder children of the said *Margaret Hewett* the sum of £1500 each when and if they should respectively live to attain the age of twenty-five years; but if both or either of them should die under that age, then she gave the said legacy or legacies of him or them so dying under that age, and the unapplied income thereof (under the provisions for such purpose thereinafter contained), unto all and every the other children of the said *Margaret Hewett* (including the survivor of the two eldest sons, provided such survivor should live to attain the age next thereinafter mentioned) as should live to attain the age of twenty-one years, in equal shares and proportions, for their own respective absolute use; and after declaring that all legacies given by her said will in all cases where the several legatees should at the time of her decease have attained

twenty-one (except the said legacies to the two elder children of *Margaret Hewett*) should be paid at the expiration of six calendar months after her decease, and that all legacies and shares of her residuary estate given to any married woman should be paid to her to her separate use, "and as to all the rest and residue of her estate and effects whatsoever and wheresoever, whether of a real or personal nature, that she might die possessed of or otherwise entitled to, either in possession, remainder, reversion, or expectancy, she gave, devised, and bequeathed the same to the said *Margaret Hewett*, and all and every such of her children as should live to attain the age of twenty-one years, including her two eldest sons, in equal shares and proportions, for their respective own absolute use and benefit;" and she declared that until the vesting of the respective legacies or shares in residue given by her will, and during the minority or minorities of any of the several legatees, as the case might be, her trustees and executors might apply the annual income of such legacies or shares in residue to which any legatee might be presumptively entitled, and might be under twenty-one, for his, her, or their benefit and education, and might advance a part, not exceeding one-third, for his, her, or their preferment or establishment in the world or otherwise, and accumulate the residue for the benefit of the legatee or legatees who should become entitled to the fund from the income whereof such accumulations should have respectively proceeded.

The testatrix died in September, 1869. Her residuary estate amounted to £23,000.

Margaret Hewett had eight children living at the testatrix's death, and questions having arisen on the will, the trustees paid the £23,000 into Court under the *Trustee Act*.

Margaret Hewett then presented this Petition, praying in the alternative that she might be declared tenant for life of the fund, or that one-ninth share of the fund might be paid to her. All the children were living at the date of the Petition, but none of them had attained twenty-one.

Mr. *Griffith Smith*, for the Petitioner:—

The tendency of modern decisions is to construe a will of this description as giving a life interest to the mother, with remainder

V.-C. W. 1871 *In re* Owen's Trusts.

to the children, and the Court will lay hold of very slight circumstances as assisting this construction. Construed literally, the words import the gift of a share to the mother; but that construction is inconsistent with the general intention of the will, and particularly with the intention apparent on the will, that all the children should participate.

[He cited *Jeffery* v. *Honywood* (1), *Morse* v. *Morse* (2), *Audsley* v. *Horn* (3), *Ward* v. *Grey* (4), and *Armstrong* v. *Armstrong* (5).]

Mr. *Chitty*, for the children:—

I admit that very slight indication of intention is, according to modern decisions, sufficient to induce the Court to give a life estate to the mother on the whole will; but here there is no such intention to be collected. The only circumstance is the gift of the £1500 to the eldest sons; but that is not enough to control the clear words of gift of a share to the mother.

[He cited *Whitbread* v. *Lord St. John* (6).]

Sir John Wickens, V.C.:—

I think that the gift of the £1400 to the younger children, to the exclusion of the two elder sons, who are included in the gift of the residue, and the reference to this in the latter gift, will justify me in holding that the mother takes a life interest in the residue. I believe that in taking this view I am deciding in accordance with the intention of the testatrix, and I am sure that such a construction is most for the benefit of the legatees. There must be a declaration accordingly.

Solicitor for the Petitioner: Mr. *Hunt*.
Solicitor for the Children: Mr. *B. Hunt*.

(1) 4 Madd. 398.
(2) 2 Sim. 485.
(3) 26 Beav. 195.
(4) 26 Beav. 485.
(5) Law Rep. 7 Eq. 518.
(6) 10 Ves. 152.

MACKIE *v.* DARLING.

V.-C. W.
1871
May 25.

Curator bonis, appointed by Court of Session, allowed to retain Assets under an English Administration.

A *curator bonis* and *factor loco tutoris* of Scotch infants:—
Held, not bound to pay into Court assets belonging to the infants receivable under an English will of which the curator was administrator, and which was in course of administration by the Court.

BY an order of the Court of Session, dated the 9th of July, 1868, the Defendant *J. S. Darling* was appointed curator of those of the infant seven children of *James Mackie*, deceased, who were aged respectively thirteen and fourteen, and therefore, according to Scotch law, above the age of pupillarity, and *factor loco tutoris* of those of Mr. *Mackie's* children who were under that age. The Defendant gave the security required by the 12 & 13 Vict. c. 51. *James Mackie* died, a domiciled Scotchman, in January, 1868.

By the will of *Margaret G. C. Preston*, a domiciled Englishwoman, the infants were named as residuary legatees. Mrs. *Preston* died in 1868, not having appointed any executors of her will. On the 18th of January, 1869, letters of administration were granted of her estate to the Defendant *J. S. Darling*, as *curator bonis* and *factor loco tutoris* of the infants. On the 28th of April, 1869, this bill was filed against Mr. *Darling*, to administer Mrs. *Preston's* estates. A decree was pronounced on the 26th of July in the usual form; and by an order dated the 25th of April, 1871, the Defendant *Darling* was ordered to pay £1600 remaining in his hands, being part of the residue of Mrs. *Preston's* estate, into Court.

The infants were also entitled to property in *Scotland* under the marriage settlement of their parents.

Mr. *Anderson*, Q.C., and Mr. *J. T. Anderson*, for the Defendant, now applied to discharge the order directing the Defendant to pay the English assets into Court, as irregular. These were Scotch infants, and the Defendant was the proper person to retain the assets. The point had been, in effect, decided by Vice-Chancellor

V.-C. W. 1871 MACKIE v. DARLING.

Wood, in *Scott* v. *Bentley* (1), which had been followed by Vice-Chancellor *Malins*.

Mr. *Dickinson*, Q.C. and Mr. *W. W. Karslake*, for the infants, expressed themselves satisfied that the fund was safe.

The VICE-CHANCELLOR discharged the order directing the payment into Court.

Solicitor for the Plaintiffs and Defendant: Mr. *William Moon*.

V.-C. W. 1871 *June* 7, 10, 21, 22.

HAYGARTH *v.* WEARING.

Vendor and Purchaser—Construction—Misrepresentation—Agency.

Where the Plaintiff, a single woman, was informed by her brother's agent that on his death she had succeeded to a small estate, of which she knew nothing, and on the agent's representations of its value, which were inaccurate, and without legal advice, she conveyed the estate for an inadequate sum to the agent's daughter, the Court set the deed aside, with costs:—

Held, also, that there was no such relation between the parties as to incapacitate the agent from purchasing:

Held, further, that the agent's claim for advances to Plaintiff's brother, as to which he pledged his oath, but of which there was no corroborative evidence of any kind, must be disallowed.

IN the early part of the year 1866, *James Haygarth*, the brother of the Plaintiff, died intestate. In the summer of the same year the Defendant *Thomas Wearing* called on the Plaintiff, who kept a school at *Kingsland Green*, near *London*, and informed her, according to the Plaintiff's version, that her brother was dead, and had left a bit of land at *Garsdale*, in the county of *York*, to which she, as his heiress, was entitled, and asked her "What she meant to do with it?" The Plaintiff replied, "She did not know;" when Defendant said, "Your brother often said we were to have it, but he never in any way made it over to us." The Plaintiff then asked the Defendant what was the value of the land to which she was entitled, to which Defendant answered, "£100, may be a trifle more or less;" and asked the Plaintiff whether she was willing he should purchase it at that price; and upon her replying in the affirmative, Defendant said:

(1) 1 K. & J. 281. 1 Jur. N.S. 394

"All my property will come to my daughter," and that he should have it made over to her. Defendant then asked Plaintiff whether she would like to consult any one upon the subject, and she replied she did not want this, because she had perfect confidence in him. About a fortnight afterwards the Defendant again called on the Plaintiff, and produced the deed in question, which, as she alleged, he represented was a conveyance of the property to the Defendant's daughter for £100, which the Defendant represented as being its value. The Defendant was an entire stranger to the Plaintiff.

The bill alleged that the Plaintiff signed the said document on the faith of the representation made by *Thomas Wearing* that she was conveying by it property worth £100, a little more or less; and that £100 was an adequate price for it; and she did not employ any professional adviser, or consult any person in relation to the said transaction, but acted therein entirely in reliance on the statements of *Thomas Wearing*, and at his instigation. The Plaintiff had no knowledge of the property of her late brother as to value or otherwise, and intended to sell the property for an adequate consideration, and believed £100 was a fair price for the property.

The version given by the Defendant of what took place at the interview was, shortly, that he had a claim for £400, and that her interest was worth about £100; that Defendant shewed Plaintiff her brother's letters, and she said that she was convinced that he intended that Defendant and his daughter should have the property, and that she was willing to carry out the said intention.

The deed was a conveyance of the property by the Plaintiff to the Defendant's daughter in consideration of £500, of which £400 was recited as a debt due from *James Haygarth* to the Defendant, and the balance was paid to the Plaintiff.

The Plaintiff, on ascertaining the value of the property to be greater than had been represented, repudiated the transaction, and filed this bill against *Thomas Wearing* and his daughter, praying that it might be declared that the conveyance, as a sale, was void, and ought to stand only as a security for what was due; and for an account of all moneys expended on lasting improvements; and an account of the rents and profits, and interest thereon at £4 per cent.

V.-C. W. 1871 HAYGARTH v. WEARING.

The Defendant *Thomas Wearing*, in the 9th paragraph of his answer, stated that shortly after March, 1854, *James Haygarth* verbally gave Defendant the farm, and proposed that Defendant should supply him with money as long as he lived; and that, in pursuance of the said arrangement, Defendant advanced him £300, and paid off a £100 mortgage; but that, after such arrangement, he kept no particular account.

The effect of the evidence is fully stated in the judgment of the Court.

Mr. *Hardy*, Q.C., and Mr. *Langworthy*, for the Plaintiff —:

First: it is proved by the evidence, that when the Plaintiff received the £100, she believed the Defendant's assurance that that amount was the value of the farm. Assuming that the parties were strangers, a sale made under such circumstances cannot be sustained in this Court: *Turner* v. *Harvey* (1); *Rawlins* v. *Wickham* (2).

Secondly: if the Court should be of opinion that, from the position of the parties towards each other, the Defendant must be treated as the Plaintiff's agent on that ground, the transaction must be set aside. An agent cannot purchase the property of his principal without the intervention of an independent adviser to protect the principal, and without the fullest knowledge of all the facts: *Tate* v. *Williamson* (3); *Billage* v. *Southee* (4).

Thirdly: on the Defendant's own statement in his answer, the transaction is invalid. The consideration expressed in the deed is £500; but the money actually paid was £100. The recital in the deed that £400 was due from the Plaintiff's brother has not been proved, and, indeed, is admitted to be incapable of proof, and must therefore be regarded as untrue. The consideration, therefore, is only £100; and the property is, on the Defendant's own shewing, worth from £500 to £700. The price given, therefore, is so inadequate as to entitle the Plaintiff to relief on that ground: *Cooke* v. *Lamotte* (5); *Carpmael* v. *Powis* (6); *Evans* v. *Llewellyn* (7). The

(1) Jac. 169, 178.
(2) 1 Giff. 355; 3 De G. & J. 304.
(3) Law Rep. 1 Eq. 528; Ibid. 2 Ch. 56-61.
(4) 9 Hare, 534, 540.
(5) 15 Beav. 234.
(6) 10 Ibid. 36.
(7) 2 Bro. C. C. 150; 1 Cox., 333.

(2 S.C. 4 Jur. N.S. 990; 5 Jur. N.S. 27 A.

whole case of bounty relied on by the Defendant is displaced by the correspondence.

Mr. *Dickinson*, Q.C., and Mr. *Chitty*, for the Defendants:—

The object of this bill is to set aside a deed executed by a person of full age and capacity. We deny that any confidential relation subsisted between the parties; and, except as to the value, the whole case of the Plaintiff has been displaced.

The VICE-CHANCELLOR:—The case suggested is, that the Defendant knew the value of the property, and the Plaintiff did not.

Mr. *Dickinson*:—That is not sufficient, as there is no want of the means of knowledge suggested in the pleadings. The bill is founded upon fraud, but no fraud or fraudulent concealment of value is proved; and, as a matter of fact, no misrepresentation is made out. The Defendant alleges, and pledges his oath, that £400 was due to him; and as there is no evidence the other way, the statute 14 & 15 Vict. c. 99, which makes a man a witness on his own behalf, also makes his evidence, if not disproved, conclusive: *Grant* v. *Grant* (1).

[They cited *Harrison* v. *Guest* (2), *Sugden* on Real Property (3), *Gwynne* v. *Heaton* (4), and *Sugden's* Vendors and Purchasers (5).

Mr. *Hardy*, in reply:—

In *Harrison* v. *Guest* the vendor had been in possession, and knew all about the property.

SIR JOHN WICKENS, V.C.:—

In this case the Plaintiff, Miss *Haygarth*, a single woman, who gained her livelihood as a schoolmistress at *Kingsland Green*, inherited in March, 1866, from her brother, a small estate in *Yorkshire*, which, after deducting £100, the amount of a subsisting mortgage on half of it, was worth, according to different estimates, between £400 and £750. The brother, a billsticker, and attendant at

(1) 34 Beav. 623. 11 Jur. N.S. 787.
(2) 8 H. L. C. 481; 6 D. M. & G. 424, 438. 2 Jur. N.S. 911.
(3) Page 585.
(4) 1 Bro. C. C. 1–9.
(5) 14th Ed. p. 275.

V.-C. W. 1871 HAYGARTH v. WEARING.

funerals, was, it may be supposed, in a somewhat lower social position than a schoolmistress, even in a very humble school, and was not on intimate terms with his sister. She seems to have had no idea that she succeeded to anything as his heiress, and did not know, probably, that he had anything to leave. In August, 1866, the Defendant *Thomas Wearing*, who is a small millowner in *Yorkshire*, called on the Plaintiff, to whom he was an entire stranger, and told her of the estate that had come to her. He had been an old friend of the brother's, and living in *Yorkshire* near the place where the estate was situated, had received the rents of it for many years, as the brother's unpaid agent. Probably he knew as much about the estate and its value as any one could know. The Plaintiff had never seen it, and knew nothing about it whatever, and her entire ignorance as to it was known by *Wearing*. There is a great conflict of evidence as to what passed between Miss *Haygarth* and *Wearing* at this their first interview, in August 1866, and some inconsistency in the statements made by each of the two persons who alone could give evidence on the subject. Miss *Haygarth's* statement is substantially that *Wearing* told her of her brother having left an estate which she had succeeded to, and which her brother had always wished to come to *Wearing* or to his family; that the value of her interest in it was £100, and that he (*Wearing*) was willing to give her that sum for it. *Wearing* represents himself to have told her that he had twelve years before made a contract with her brother, not legally binding or reduced into any legal form, to the effect that he (*Wearing*) was to have the estate as from the date of the contract, on condition of supplying the brother with what he needed during his life; that on the faith of this contract he had actually advanced to the brother £300, in addition to the rents of the estate; that he was entitled to be repaid this, at any rate, out of any property the brother might have left; and that the *Yorkshire* property was worth £400, less the mortgage; and that Miss *Haygarth*, on this statement, said, in effect: (I do not mean that these were the actual words used) "I do not want to have anything to do with my late brother's property: he intended you to have it, and I feel morally bound to give effect to his wishes. Give me £100, and I will convey it to you." This is the general effect of his statements, as well as I can make them out. It is

not necessary at present to consider what would be the position of the parties in this Court if the case set up by the Defendants were established in fact. In my judgment, the supposition of Miss *Haygarth* having intended to make a gift of value either to *Thomas Wearing*, whom she then saw for the first time, or his daughter, whom she had never seen, out of deference to the alleged wishes of a brother, with whom she was not intimate, and of whom, in fact, she knew little, is too improbable to be believed. I thoroughly believe her when she says that her own idea was that of selling, not of giving. I also cannot credit that she was told, and believed, that her brother, whom she supposed to have died without property, had left an estate worth £400, but that he had incurred in his lifetime a debt of £300, which ought to be deducted from it. Believing that she had no intention to make a gift or recognise what is called a moral claim, I disbelieve that if any such statement had been made to her she would have acted on it without any sort of proof or even inquiry, and then forgotten it.

The true conclusion as to what passed seems to me to be substantially in conformity with the Plaintiff's statement. Some attempt was made to discredit this, on account of her having forgotten that *Wearing* produced to her letters from her brother. If, as is probable, he shewed these merely as proving his identity and the friendship between them, it was not unnatural that the circumstance should pass out of her mind, though she could hardly have forgotten it if they had operated on her mind as *Wearing* has alleged. No doubt, after discarding all that appears to me incredible in what is stated, enough remains that is hard to understand or believe, since it is beyond doubt that Miss *Haygarth*, without taking time to consider, without inquiry and without advice, at once agreed to receive £100 and make over her unknown property to Mr. *Wearing*, or rather to his daughter, to whom he wished it to be conveyed. This is surprising enough, even if she were, as in fact she seems to have been, less a woman of business than the least businesslike of ordinary women. But that she intended to make a valuable gift to a stranger, either from a lofty-minded contempt of inheriting anything from her brother (it is to be supposed beyond £100), or from feeling morally obliged to carry out the wishes of a brother with whom she was not, at any

V.-C. W. 1871 HAYGARTH v. WEARING.

rate, sympathetic, or that without any idea of bounty or moral obligation she accepted *Wearing's* statement that her brother owed him £300, and upon that mere statement agreed to pay it out of his property without further inquiry, appears to me altogether beyond belief. After this interview in August, 1866, *Wearing*, who, to do him justice, seems to have wished her to consider her position and to consult her friends, and who certainly did not hurry her into hasty action on an ill-considered resolution, waited until October, 1866 (there is an immaterial letter only occurring in the interval), and then brought her a deed which was not read over to her, or seen by any one on her behalf, and which, in fact, Miss *Haygarth*, as I gather, never discovered the actual contents of until she instituted this suit. The deed is stated in the 18th paragraph of the answer. It is unnecessary to read it at length; but I may say that, after reciting the title of *James Haygarth*, subject to the mortgage for £100, and reciting that *Thomas Wearing* from time to time advanced to *James Haygarth* divers sums of money which, with interest thereon, and the sum of £100, and interest, paid to the mortgagees, then amounted to the sum of £400, and that the same was still due and owing to him; and reciting *Haygarth's* death, and reciting that *Elizabeth Wearing* had contracted and agreed with *Sarah Haygarth* for the absolute purchase of the entire fee of the property for £500; and that upon the treaty for the purchase it was agreed that the sum of £400 should be paid to *Thomas Wearing* out of the purchase-money, it was witnessed that, in pursuance of the agreement, and in consideration of £100, the sum due on the mortgage, and £400 of like lawful money by *Elizabeth Wearing*, at the request and by the directions of *Sarah Haygarth*, testified in the usual way, paid to *Thomas Wearing*, and also in consideration of £100 paid to *Sarah Haygarth*, the property was conveyed to *Elizabeth Wearing* in fee. The rest of the story is short: Miss *Haygarth* wished to see Miss *Wearing* as the daughter of her brother's friend, to whom she had conveyed the property by her father's desire, and Miss *Wearing* called on her the next day. This fact, as to which nothing further is stated, is relied on as corroborative evidence that Miss *Haygarth* had made Miss *Wearing* a very valuable present before knowing her. She subsequently visited the *Wearings* in *Yorkshire*, and, it is said,

might have seen and inquired about the estate if she had chosen, but did not do so. This is relied on, not very strongly, as affecting her with constructive notice of its value; and, with more reason, as shewing that *Wearing* was not afraid of inquiry as to what he had done. But he must have known by that time perfectly well that Miss *Hayyarth* was not likely to take any reasonable means of testing what he chose to tell her. In 1866, a relation returning from abroad, and who took some interest in Miss *Haygarth's* affairs, learnt the true value of the estate, and told her that what she had sold for £100 was worth five or six times as much. Inquiries followed which elicited no information, although this seems to have been the fault of *Wearing's* solicitor more than of *Wearing* personally. In November, 1869, the bill was filed.

In considering the Plaintiff's title to relief, it is necessary to notice the question, which was much argued, whether there was any fiduciary relation between *Wearing* and Miss *Haygarth* in August or October, 1866. I think there was not. In my opinion, Mr. *Wearing* was not, at either date, disentitled to enter into a contract with Miss *Haygarth* for the sale of the property she had inherited, by reason of his having acted as her agent without her knowledge, or because of the existence between them of any relation which withdrew contract between them from the considerations affecting contracts between strangers. He knew everything about the property and the circumstances. She knew nothing, and he knew that she knew nothing. He was more or less of a man of business; she was as far as possible removed from a woman of business; and these circumstances would necessarily be of importance in judging of the effect in this Court of any contract between them. But fiduciary relation, in the sense in which this Court used those words, and applies them in exercising a most valuable part of its jurisdiction, there seems to me to have been none. Independently, however, of any fiduciary relation, this Court holds that a person obtaining a conveyance of real estate on the faith of certain representations which are afterwards shewn to be untrue, must submit to have the conveyance treated as fraudulent and void against the person deceived. In this case the representation that he made to her—as I infer from the evidence, and especially from his own answer—was, that the value of what she had to sell was about £100.

V.-C. W. 1871 HAYGARTH v. WEARING.

This was not a mere purchaser's assessment, but a deliberate statement made to her by a person having full knowledge, which statement was asked by her for her guidance in the transaction, and was acted on by her in reliance on its good faith and accuracy. It seems to me that it was untrue, putting out of sight any right of hers in respect of rents received since her brother's death. I am convinced by the evidence that the value of her interest was considerably above £100, even if £300 was to be considered as deducted from it for *Wearing's* advances to the intestate. There is, of course, conflicting evidence on the point; but, considering that the actual rent was, in 1866, £25, the extent being fifty-nine acres, of which forty-two and a half were an allotment from the waste made in 1859, I cannot help believing the estimate of the Plaintiff's witnesses rather than that of the Defendants. No doubt the tenant of part of the property producing £20 says that his rent was too high; but as he does not say how much too high, and has paid it for twenty years, and still pays it, I can attribute no weight to this. It is not immaterial to remark that only one of the Defendant's witnesses, *Bentley*, brings the value down to £500, which he does by estimating it as worth, to rent, in 1866, £20, or £5 less than it was let for, and then taking twenty-five years' purchase. Mr. *Hall*, another of them, though he makes the value, to rent, in 1866, £19 only, puts the fee simple value then at £530, or twenty-eight years' purchase. If the Defendant had, under the circumstances, represented that the true value of the estate, free from incumbrances, was £500, when it really was £530, that might, I think, have been sufficient, under the circumstances, to constitute a misrepresentation; but after fairly weighing the answer and all the evidence, and not forgetting the letter of the 5th of June, 1869, I am convinced that the misrepresentation on his part as to value was much greater. There is, however, an important consideration remaining. To make the value of Miss *Haygarth's* interest £100 only, *Wearing* not only treated the value of the estate, free from incumbrances, as £500 only, but gave himself credit against it for £300 alleged to have been advanced by him to the intestate. I infer, from the evidence, that this mode of calculation was not explained by him to the Plaintiff, though the point is not perhaps, under the circumstances, material, considering the point

already adverted to. It lies on the Defendants, I think, if they claim credit for the £300, to prove the fact of that sum having been advanced. This they attempt to do by *Wearing* simply swearing to it in the most vague and general terms. There is not the slightest corroboration from any one who knew the fact, or from any banker on whom drafts were drawn—no sort of contemporaneous entry in any account or journal, no sort of acknowledgment, except some vague passages in the intestate's letters, which mention no sum, and might equally well, I believe, apply to other matters. There is not a single application by the intestate for an advance, or suggestion of a wish for an advance, though his letters appear to have been carefully kept. *Wearing* says, in effect, that in the course of twelve years, during which he kept no sort of account, he paid over to the intestate (besides from £200 to £300 at least arising from the property) an additional sum of £300, but he is unable to state any principle on which the payments were made, whether they were at fixed times or at varying times, what was the amount of any one payment, or how he arrives at the total which he alleges, rather than at any other sum. This statement is, no doubt, evidence which I am bound to weigh as a jury would do; but so weighing it, I am wholly unable to accept it as proving the fact. In so far as the onus of proving that he advanced £300 to the intestate over and above the proceeds of the intestate's property lies on the Defendants, they have, in my judgment, failed to discharge it. It follows, from what I have said, that the conveyance must be declared void against Miss *Haygarth*. The same conclusion would, I conceive, have resulted from the same view of the evidence in other respects, if I had held that the true transaction was intended as substantially a gift by Miss *Haygarth*, and not a sale; for, independently of any fiduciary relation, I conceive that *Wearing* could not support a gift obtained from Miss *Haygarth* on the footing of certain representations, without shewing those representations to be true. But if I had believed that Miss *Haygarth* had really intended to make a gift to *Wearing* or his daughter, I might have felt some difficulty in dealing with her case, as stated in the bill. As it is, I entirely believe the Plaintiff's statement, that any idea of bounty to *Wearing* or his daughter never entered her mind. The decree will therefore be to declare that the conveyance

V.-C. W. 1871 HAYGARTH v. WEARING.

of the 4th of October, 1866, ought, as against the Plaintiff, to be treated as void; an account will be directed of what is due to Miss *Wearing* for principal and interest on the mortgage for £100 and on the £100 paid at the time of the conveyance, with 4 per cent. interest, after giving credit against this for the rents received by her. The account will not treat her as mortgagee in possession, but be a mere account of rents and profits received by or for her; and if asked, I will direct allowances for lasting improvements. The Plaintiff will have liberty to redeem on payment of the balance found due. There will be no account on either side as regards any period before the intestate's death; but I think that I ought to direct an account against *Thomas Wearing* of all rents received between the intestate's death and the conveyance, having regard to the statement in the answer that the £100 was to cover all claims in respect of them. It would be simple, and probably not unfair, to credit those against the two sums of £100 and the interest; but that cannot be done without Miss *Wearing's* consent. If this is withheld, as no further consideration will, I think, be necessary, the best way might be to direct *Wearing* to pay that amount into Court within a certain time after the certificate, and reserve liberty to apply at Chambers with regard to it. There remains the question of the Plaintiff's costs of the suit up to and inclusive of the hearing. Considering the way in which her case has been met, and especially the letter of 1869 refusing information to her solicitor, they must, I think, be paid by the Defendant *Thomas Wearing*. Nothing will be said as to Miss *Wearing's* costs up to the hearing, or as to *Wearing's* costs of the subsequent proceedings. As regards Miss *Wearing*, the costs subsequent to the hearing will follow the ordinary rule in redemption suits. To meet the possible case of either party causing unnecessary costs in Chambers, there will be general liberty to apply as to costs or otherwise in addition to the special liberty already mentioned; but my intention is, that the general liberty to apply should be only made use of in case of some such misconduct as I have suggested.

Solicitors for the Plaintiff: Messrs. *Parker, Rooke, & Parkers.*
Solicitors for the Defendants: Messrs. *Shum & Crossman.*

In re LONDON AND MEDITERRANEAN BANK.

V.-C. W.
1871
June 8, 26.

WRIGHT'S CASE.

Winding-up—Misrepresentation—Surrender of Shares—Contributory who had been by the Court of Appeal removed from List of Present Members placed on List of Past Members.

4 Ch D 333
7 Ch D 80

J. W. was in June, 1865, allotted ten shares in the *L. & M.* bank, a company registered on the 13th of April, 1865, under the *Companies Act*, 1862, and whose prospectus stated, but untruly, that 80,000 shares had been subscribed. A settling-day on the *Stock Exchange* having been refused, the directors, in September, 1865, entered into an arrangement to amalgamate with another company. *J. W.*, on the 6th of October, said that he should prefer having his deposit money back; and at a meeting of the shareholders on the 16th of October a resolution was passed that all persons to whom shares had been allotted and who had paid deposits were entitled to have their allotments cancelled and money returned. This was made known to *J. W.* on the 20th of October, and he thereupon signed a receipt for his deposit, which was returned to him by cheque dated the 2nd of November, and in the register of shareholders there was written opposite to his name, "Money returned and allotment cancelled." On the 6th of November it was, at another meeting, notice for which was given on the 20th of October, resolved that the bank should be wound up voluntarily, and this resolution was confirmed on the 22nd of November, and liquidators were appointed. *J. W.* did not, until after the 22nd of November, discover that there had been a misrepresentation in the prospectus. The voluntary winding-up was, in June, 1866, ordered to be continued under supervision of the Court. The 39th of the articles of association enabled the directors to accept a surrender of any shares. In November, 1867, on a summons by the liquidators, *J. W.* was placed on the "A" list of contributories as a present member, but on appeal he was removed, on the ground that the directors had a power to accept a surrender of shares, and that the so-called cancellation might be supported as tantamount to a surrender. The liquidators having exhausted the "A" list, subsequently placed *J. W.* on the "B" list of past members, and an application on his behalf to be removed was dismissed on the ground that he had not before the winding-up proceedings commenced elected to exercise his right to have his allotment cancelled in consequence of the misrepresentation in the prospectus.

Revd by L.C. 7 Ch 55.

THE *London and Mediterranean Bank, Limited*, in pursuance of an agreement with another company, not material to be mentioned, was on the 13th of April, 1865, registered as a limited company under the provisions of the *Companies Act*, 1862, with a nominal capital of £2,000,000, divided into 100,000 shares of £20 each.

V.-C. W. 1871

WRIGHT'S CASE.

The prospectus issued on the above date stated that 80,000 shares had already been subscribed. There was to be a deposit of £1 per share on the application for, and £1 10*s.* on the allotment of, shares. On the 4th of May, 1865, *Joseph Wright* made an application for fifty shares; on the 8th of May he paid into the company's bankers the sum of £50 as a deposit; on the 12th of June the directors allotted him ten shares; on the 3rd of July he received back the sum of £25; and on the 14th of July he, having on the 6th been informed that they were ready, obtained the certificates for his shares certifying that he was the holder thereof and registered as a member of the company in respect of the same. The committee of the *Stock Exchange* having twice refused to grant a settlement-day, the directors of the bank, on the 7th of September, 1865, entered into an agreement with the *London and Bombay Bank, Limited,* that the two banks should be amalgamated, and that the united banks should be styled "The *London, Bombay, and Mediterranean Bank, Limited,*" and circulars were sent to the shareholders notifying these facts to them. On the 27th of September, 1865, a notice was issued to each member calling an extraordinary general meeting of the company to be held on the 16th of October; but on the 6th of October, 1865, Mr. *Wright* wrote and sent to the secretary of the company the following letter:—

"*Wimbledon,* Oct. 6th, 1865.

"Sir,—I duly received your circular on the subject of the transfer of the company's business to a *Bombay* banking establishment, and I beg to say that I should very much prefer to have my money back.

"After the twice repeated refusal of the committee of the *Stock Exchange* to grant a settlement, there is, I think, no other course open to the directors but to return the money to the subscribers.

"Yours respectfully,

"*Jos. Wright.*"

At the meeting of shareholders held on the 16th of October, at which Mr. *Wright* was not present, the following resolution, with two others approving the arrangements for the amalgamation, and recommending the shareholders to take in exchange for each £20 share in the *London and Mediterranean Bank* a £10 share in the

London and Bombay, credited with four-fifths of the amount paid on the £20 share given in exchange for it, was passed :—

"That in consequence of the refusal of the committee of the *Stock Exchange* to grant a settlement in the dealings in the shares of this bank, all the persons to whom shares in the bank have been allotted, and who have paid the sum of £2 10*s.* per share thereon, are entitled, if any should desire it, to have their allotments cancelled and their money returned without interest."

On the 20th of October, 1865, the secretary of the company sent the following letter, with a copy of the resolutions, to Mr. *Wright* :—

"*London and Mediterranean Bank, Limited,*
"(Transfer Department.)
"24, *Old Jewry, London,* 20th Oct., 1865.

"Sir,—In calling your attention to the inclosed resolutions of the general meeting of this company, held on the 16th instant, I am desired by the directors to express their full confidence in the success of the amalgamated banks, and their hope that you will elect to continue a member; but should you desire to avail yourself of the option given in the third resolution, you will require to do so within fifteen days from the date hereof, by returning on or after the 1st of November next, to me, at the above address, your ten share certificates, along with the annexed receipt, duly stamped and signed by yourself, for the sum of £25 paid by you, when that amount will then be repaid, and your allotment cancelled.

"I am, Sir,
"Your obedient servant,
"*Joseph Wright*, Esq. *George Cumming*, Secretary."

Mr. *Wright* signed the receipt, which was in the following terms, and returned it to the secretary with the certificates :—

"Received from the *London and Mediterranean Bank, Limited*, the sum of twenty-five pounds, in repayment of that amount paid by me upon an allotment of ten shares in that company.

"*Joseph Wright.*"

And he afterwards received a cheque dated the 2nd of November, 1865, for the amount mentioned, and which he had paid on allot-

V.-C. W. 1871

WRIGHT'S CASE.

ment. In the register of shareholders there was written opposite to his name, "Money returned and allotment cancelled" (1).

On the 20th of October a notice was issued calling another extraordinary general meeting of shareholders, to be held on the 6th of November, for the purpose of passing a special resolution requiring the company to be wound up; and on the 6th of November at such meeting it was resolved "that the *London and Mediterranean Bank* be wound up voluntarily." At another meeting of shareholders, held on the 22nd of November, that resolution was confirmed, and liquidators were appointed. The voluntary winding-up was, in June, 1866, ordered to be continued under the supervision of the Court.

The liquidators, in November, 1867, took out a summons, asking that Mr. *Wright* might be placed on the list of contributories, and on the hearing before Vice-Chancellor *Stuart* (2) on the 13th of February, 1868, he granted the application.

Post 346-8

(1) Art. 34 of the association stated that "Every share which shall be forfeited as aforesaid shall thereupon be the property of the company, and may be sold, re-allotted, cancelled, extinguished, or otherwise disposed of, either to the original holder thereof, or to any other person, upon such terms and in such manner as the directors think fit;" and Art. 35, that "In case the whole or any part of the business or property of the company shall be sold in accordance with the powers for that purpose herein contained, and any member of this company shall neglect, or refuse to do or concur in anything which may be declared by a general meeting necessary or expedient to be done by the members for the purpose of carrying such sale into effect, it shall be lawful for the directors to forfeit the shares of any member who shall so neglect or refuse as aforesaid, and any shares so forfeited may be cancelled or sold or otherwise dealt with as the directors may think fit, but the company shall within fourteen days after the forfeiture of any such shares pay to such members the value thereof according to the market price thereof on the day on which they were forfeited;" and Art. 39, that "The directors may at any time accept the surrender of any shares from any shareholder desirous of surrendering them on such terms as the directors may think fit."

(2) SIR JOHN STUART, V.C.:—

Mr. *Wright's* case is, that having been a shareholder for ten shares in the *London and Mediterranean Bank*, his shares have been properly cancelled, and that he ought not to be upon the list of contributories. The Chief Clerk had an impression that the articles of association authorized a cancellation of the shares. That, however, is a mistake. The authority given by the articles is an authority to transfer or to accept a surrender. By the 3rd resolution, passed on the 16th of October, 1865, it was resolved that, inasmuch as no settling-day had been allowed by the committee of the *Stock Exchange*, the shareholders who had had shares allotted to them might have their allotments cancelled, and the moneys paid by them returned.

Mr. *Wright* appealed against that order, and on the hearing before the Lords Justices (1), on the 13th of March, 1868, they removed his name from the list.

The first question to consider is, whether that was a valid resolution? The objections to it are, that according to the articles of incorporation of the company, no resolution can be a valid resolution of which notice has not been given. The meeting at which this resolution was passed was called for the purposes defined in the notice. The notice states nothing about the cancellation of shares. The first two resolutions passed on that occasion were resolutions with reference to the business mentioned in the notice. That objection, therefore, is fatal to the resolution. In order to be valid, it must be a resolution passed upon proper notice. If the resolution is invalid the cancellation must be invalid; and it is to be observed, with reference to this question of cancellation, that at the time when this resolution was passed the *London and Mediterranean Bank* had entered into an agreement for what is called amalgamation, or junction, of its concerns with another bank, and the formation of a new company, which should carry on its business under the name of the *London, Bombay, and Mediterranean Bank*. The *London and Mediterranean Bank*, at the time when they resolved upon this amalgamation, had been carrying on business, not for a long time, but for some time, and the nature of their business was very extensive. For all the debts contracted by them during the time they carried on their business the persons liable to the creditors are the shareholders. It is perfectly certain that up to the date of the resolution to amalgamate and form a new bank, to be called the *London, Bombay, and Mediterranean Bank*, *Wright* was a shareholder of the *London and Mediterranean Bank*, and being a shareholder was liable to all its creditors. Even if this had been a valid resolution and a valid cancellation, no shareholder of a company which has brought its business to an end can escape from his liability to the creditors by saying, that all the other shareholders who had joined with him in the company had agreed to allow him to cancel his shares. An agreement of that kind may be a valid agreement as between the shareholders themselves, but it never can relieve the shareholders whose shares are affected to be cancelled from liability to the creditors.

Upon the whole of this case it is clear Mr. *Wright* has not had his shares properly cancelled, and he must remain on the list subject to his liability as a shareholder. There will be no order as to costs.

(1) SIR W. PAGE WOOD, L.J.:—

The question in this case is, whether or not the order of the Vice-Chancellor can be sustained which directs Mr. *Wright* to be placed upon the list of contributories of this company. Regarding the books of the company alone, and looking at the position of Mr. *Wright de facto*, we find in the books of the company an entry which is distinctly under date of the 2nd of November; his name there appears, and there is also entered "the allotment of shares cancelled and deposit returned." That is what appears took place on the 2nd of November, 1865. The company did not pass the resolution to wind up voluntarily until the 16th of November, in pursuance of

V. C. W. 1871 — WRIGHT'S CASE.

Mr. *Wright*, on cross-examination upon his affidavit filed on the 29th of June, 1867, said: "I produce the prospectus marked *A.*, exhibited to my affidavit; this is the duplicate of the prospectus I

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certain circulars and notices sent out on the 20th of October, and the order of the Court continuing the winding-up under supervision was not till some months after that, namely, in the month of June of the following year, 1866. *De facto*, therefore, the name of Mr. *Wright* was taken off the register on the 2nd of November, and the question is, whether *de jure* it was so removed.

I think one need not dwell at any length on the effect of the word "cancelled." A great portion of Mr. *Higgins'* argument was directed to that word "cancelled" in this sense: He says it has been decided that a company formed like that has no power to diminish its capital. But there is no question of diminution here; the expression is simply "the allotment cancelled," not "the shares cancelled," so as totally to destroy so much capital, but simply that the allotment is cancelled; and the allotment being cancelled as to *A.*, it is competent to the company to allot them to *B.* They have got rid of *A.* Whether they have got rid of *A.*, or cancelled the shares, whichever expression you choose to use, it means no more than this, that his allotment is disposed of, and the shares are free now to be allotted to anybody else. This is the mode in which it must be treated.

Now, I will just go shortly through the important dates before I apply the instruments which have to be considered, and before I apply the law to the state of facts and to the instruments upon which the parties' rights are founded. The facts are simply these: First, there is a society called the *Continental Bank*, which is formed for ordinary banking purposes. Then it is thought expedient to form a new bank, to be called the *London and Mediterranean Bank*, which is the bank now before us; and the bank is formed by arrangements which seem to have been made in April, 1865. Then a prospectus is issued containing that statement about 80,000 shares having been subscribed for; then, in May, Mr. *Wright* applies for shares, and in June they are allotted to him, and the deposit is paid. Then after that it strikes this newly-formed bank, which was formed for the purpose of taking up and absorbing the *Continental Bank*—it appears to those who constitute the new bank that it will be desirable again to form a third company by an union with another bank, which for shortness has been called the *Bombay Bank*; and accordingly an arrangement is entered into by which that mixture called amalgamation shall take place between the two banks, which I will presently refer to. In the meantime, before getting to the actual transfer of the one company to the other, it is right to state that the memorandum of association and the articles of association were entered into by this very short-lived bank, of which Mr. *Wright* became a member, and those articles will have to be considered presently. The arrangement now being made for the transfer to a new company, the members of the *Mediterranean Company* are invited by a circular to an extraordinary general meeting for two purposes — one purpose being to consider the question of the agreement with the *Bombay Bank*, and the other purpose to consider what is necessary to be done by the members of the *Mediterranean Bank* for the pur-

had at the time. It is not the same, because the form of application and receipt is not torn off. I am certain that I read the prospectus originally. I am certain that I gave credence to the

V. C. W. 1871 WRIGHT'S CASE.

pose of carrying into effect the new arrangement with the *Bombay Bank*. That meeting, being convened for the 16th of October, pass certain resolutions, one of which we shall have to consider presently; and having passed those resolutions, which affect to adopt, on the one hand, the agreement, and on the other hand to say that the existing proprietors of the *Mediterranean Bank* should have an option offered to them of retiring from the *Mediteranean Bank*, and receiving back their deposits without interest—having passed those resolutions, by a circular dated the 20th of October following, four days after the meeting, those resolutions are communicated to all the shareholders—to Mr. *Wright* and the other shareholders—and the option is propounded to them; and that letter professes to be written by order of the directors: it is written by the secretary and sent by order of the directors. The same post, I suppose, would bear to each of these gentlemen the notice of the 20th of October, convening a meeting for the 6th of November, for the purpose of considering the winding up of the company, obviously with a view of carrying into effect the arrangement with the *Bombay Bank*. In the interim Mr. *Wright* accepts the option so offered to him of having his original allotment cancelled, obtains a cheque returning his money, and the entry I have mentioned is made, bearing the same date as the cheque—having, therefore, on the face of it the appearance of *bona fides*; and there is not one word by any witness questioning the *bona fides*, and there has not been a syllable urged to shew that the whole transaction was not completed on the 2nd of November by the bank. That being so, on the 6th the parties meet and come to the resolution to wind up voluntarily, and liquidators are chosen, and subsequently a winding-up under the supervision of the Court is ordered in the following June.

Now, we have to look at the documents on which Mr. *Wright* founds his claim to insist on that third resolution being carried into effect; or at all events, if that be not within the competency of the meeting, to insist on the articles which enable the directors to accept the surrender of shares on such terms as they think proper. The only articles of the articles of association necessary to be observed are those which occur under the division of "Forfeiture of Shares," No. 8 in the deed, and these run from the 30th to the 39th articles. The first one, however, which is important to be mentioned, is the 35th, for I do not think the question of actual forfeiture under the 34th section is in itself material. It simply says, that every share which shall be forfeited as aforesaid shall be dealt with in a particular manner; but the 35th article is of some importance, because there the whole company, foreseeing the case which has happened—of the whole business and property of the company being sold—and foreseeing those difficulties which are touched upon by the 161st section of the *Companies Act*, 1862, namely, the difficulties which might arise from reluctant shareholders, who might stand out against the sale of the property, or the amalgamation of the company with another company, makes this provision: "In case the whole or any part of the business or

V.-C. W. 1871

WRIGHT'S CASE.

number of shares stated in the prospectus to have been subscribed for at the time previously to the passing of the resolution giving me the option of having my money back. I did make application

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property of the company shall be sold, in accordance with the powers for that purpose herein contained "—which I may say are fully sufficient to warrant the sale—"and if any member of this company shall neglect, or refuse to do or concur in anything which may be declared by a general meeting necessary or expedient to be done" (those words are noticeable) "by the members for the purpose of carrying such sale into effect, it shall be lawful for the directors to forfeit the shares of any member who shall so neglect or refuse as aforesaid; and any shares so forfeited may be cancelled, or sold, or otherwise dealt with as the directors may think fit; but the company shall, within fourteen days after the forfeiture of any such shares, pay to such member the value thereof, according to the market price thereof on the day on which they were forfeited." So that the result of an arrangement by the company sanctioning the sale to any other company, and directing what acts were necessary to be done—directing, as we shall presently see, among other things, the exchange of shares in the existing company for shares in the new company—any resolution of that description would cause immediately this consequence as regards any shareholder unwilling to enter into the new speculations, that he would be liable to have his shares declared forfeited if the directors thought fit; but he would be entitled to have the market value paid to him by the directors. That would be his position as things stood, supposing nothing more was done at the meeting convened for the purpose of confirming the agreement and carrying it into effect.

Then there is a very important article, the 39th, which says: "The directors may at any time accept the surrender of any shares from any shareholder desirous of surrendering them, on such terms as the directors may think fit." The fullest and largest power is given them for surrendering shares, and it is not open to any of those objections raised by Mr. *Higgins* with reference to diminishing the capital of the company. It is substantially this, that the shares may be surrendered, and when surrendered, may be re-issued, and that is all that both provisions are intended to meet. Therefore, on the one hand, you see what would be the consequences to every shareholder of refusing to concur in what might be thought proper by a general meeting, sanctioning union with another company, and, on the other hand, you see powers vested in the directors of accepting surrenders on any terms which they might think right and proper.

The first question, and one very strongly and ably argued on both sides, is this, what was the competency of the meeting which took place on the 16th of October, with reference to the dealings which that meeting professed to sanction as regards shares held by members in the *Mediterranean Company*? The notice of the meeting was this: an arrangement had been made, which, for all purposes of this decision, will be found sufficiently noticed in the resolutions that were passed at the meeting; and I am not going in any detail into those arrangements; but an arrangement had been made with the *Bombay Bank* which was thought to

for the return of my money; but, on consideration, I am unable to say whether it was before or after the passing of the resolution. I cannot at this date remember exactly the reason why I asked to

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be a beneficial arrangement, though it was felt that there might be some members who might take a different view. I merely make this single remark with reference to the *bona fides* of the transaction, and it is important to make that remark, though it may not probably make any difference in point of legal effect with regard to the winding-up; but with regard to *bona fides*, it is to be observed that though the company was to be wound up, as it afterwards was, for the purpose of carrying this agreement into effect, it was wound up not with a view of dealing with it as an insolvent company, but because it was thought that it was a beneficial arrangement, and one which would be advantageous to every member of the old company. I merely mention that in passing, because it is important as bearing on the *bona fides* of Mr. *Wright* and the directors in the resolutions that were come to. The summons for this meeting was in these words (it is dated the 27th of September, 1865):—"Notice is hereby given that an extraordinary general meeting of the company will be held at the *Baltic Sale Room, South Sea House, Threadneedle Street,* in the city of *London*, on Monday, the 16th day of October, 1865, at twelve o'clock at noon, for the following purposes, namely: 1st. To consider an agreement bearing date the 7th day of September, 1865" (which is the agreement in question with the *Bombay Bank* purporting to be an union of the two companies on the terms in the agreement); "2nd. In the event of this agreement being approved by the meeting, to declare what is necessary or expedient to be done by the members of this company for the purpose of carrying such agreement and sale into effect," having an express reference to the 35th article of association, in order to bind every body by a resolution that might there be passed, as to what was expedient or necessary to be done, for the consequence of that resolution is expressed in Art. 35 of the articles of association. Accompanying that notice there was a letter which is in these words—I merely notice a few words at the beginning of it—"In sending you the accompanying notice of an extraordinary general meeting for the 16th of October proximo, I am desired by the directors to inform you that the objects they had chiefly in view in promoting the amalgamation were to reduce the individual liability of the shareholders in this bank, and to strengthen their position by an union with another established bank, having a large subscribed capital," and so forth. I merely mention that to shew that the insolvency of the bank was not an object in contemplation, that their position was to be strengthened, that they were to go on as members of this new bank, that they were to be merged into this new bank, and it wae necessary to have a winding-up for the purpose.

Then the members of the bank met and passed three resolutions, on which the main argument in this case has arisen. They pass, first, a resolution that this agreement shall be ratified. Second, "that this meeting declares that for the purpose of carrying into effect the sale of the business and property of this company to the *London and Bom-*

V.-C. W. 1871 WRIGHT'S CASE.

have my money back, but I think there was some talk of an amalgamation with another company. I do not remember making any complaint on or prior to asking to have my money back; at that

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bay Bank and General Financial and Insurance Agency Corporation (Limited), in accordance with the agreement of the 7th day of September, 1865, which has been approved and confirmed by this meeting, it is necessary that the members of this company should accept in exchange for each £20 share held by them respectively in this company a £10 share in the *London and Bombay Bank and General Financial and Insurance Agency Corporation, Limited*, and with a sum equal to four-fifths of the amount paid up on each such £20 share." Therefore they now declare, according to the 35th section of the articles, what is necessary to be done by every member, and everybody must do that or forfeit his shares, subject to being paid the market value for them. Then the third resolution is, "That in consequence of the refusal of the committee of the *Stock Exchange* to grant a settlement in the dealings in the shares of this bank all the persons to whom shares in the bank have been allotted and who have paid the sum of £2 10*s.* per share thereon, are entitled, if any should desire it, to have their allotments cancelled and their money returned without interest." The expression "entitled" might undoubtedly be cavilled at, because it might be said that that was going beyond anything that anybody could possibly claim as a right at law, but I read that as meaning no more than is meant by the secretary's letter afterwards, that they are all to have an option of doing that if they think fit, instead of joining with the new company. The shareholders are, therefore, convened together expressly to say what must be done by every member before the agreement could be performed. That, in itself, involves a matter of very serious consideration, for every member of the company is to say whether he will or not accept a transfer, and on those terms exchange his £20 shares for £10 shares in the other company. If it were necessary to rest this case on this argument, I should be very strongly inclined to hold (though I do not think it necessary to do so) that there was a fair and sufficient notice in the notice that was given to the shareholders who were invited to meet, first to sanction the agreement, and then to say what was proper to be done by the members of the company, which would seriously affect the position of all members present, for the purpose of carrying the agreement into effect. Then they come to this view, "Inasmuch as this is necessary to be done, let us consider the position of the members of our company; let us consider that 35th article and the position in which members may be placed. We know that a difference has arisen with reference to the settling-day. We know that complaints have been made." It is in evidence that Mr. *Wright* has complained. I do not assume that it is a model case in that respect, but it is enough for me to say that one member has complained, and I am strongly inclined, I confess, to hold that the doctrine of notice is not so binding as this—that when the whole question for the company, and the whole question which they are invited to consider, is the propriety of an agreement, when they are invited to consider what is necessary to be done by members in order to carry that agreement into effect,

time I had no ground of complaint except the proposed amalgamation with other companies; at that time I knew nothing of the inaccuracies in the prospectus. The shares had been previously

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when it strikes them that owing to the difficulties that have arisen there may be a very serious question whether or not the members can be induced to carry that agreement into effect under the provisions of the 35th article alone, and, therefore, whether it may not be just and expedient that the members shall also have an option of a different character from that given by the 35th article — whether it would not have been competent and proper for them to carry the whole business to its legitimate end, and to say, the agreement is right, these things are necessary to be done, but in order to effect the object we have in view of carrying into effect the agreement, this third resolution becomes necessary. I might put it in this way—suppose they had felt the provisions of this agreement are only to be carried into effect provided we agree to do that, provided such and such other things are done. I apprehend that after a resolution to sanction that agreement an absent shareholder can hardly be allowed to say: "I did not allow that agreement with any conditions attached to it; I was invited to consider the agreement *simpliciter* as it stood." I quite understand his not being bound by a resolution that made the agreement more onerous, but suppose there have been terms in the agreement which were favourable to the company itself, nobody would think of arguing that because this was not an express invitation to all parties concerned to consider all the possible modifications that might take place for the benefit of the company, therefore the meeting itself had proceeded on that which was *ultrà vires* in coming to any such modified resolution. Then the second resolution says what is necessary to be done, and the third resolution states the position in which those persons might be placed if they should happen to object to carry into effect the resolution.

But happily, it appears to me, for the sake of justice (for, as regards the justice of the case, nobody can entertain any doubt that a grievous wrong would be done Mr. *Wright* if he were to be placed on the list of contributories), there is a power in the directors, which it appears to me they must be taken on the evidence before us to have exercised. They have power under the 39th article to accept the surrender of any shares from any shareholder desirous of surrendering them, on such terms as they may think fit. Suppose they had thought fit to say simply here is the 35th article, which enables us to forfeit the shares paying the market price, we think that is not an expedient course, we think it better to take the surrender from the shareholders on other terms, especially if they come and press us with difficulties as to the settling-day not having been appointed, and come in large numbers, telling us that they are not disposed to assent to the union with the *Bombay Bank*, and create considerable difficulty hereafter, what are the best terms we can make. Suppose they agree: "The terms we will make are these: we see you are unwilling and reluctant to enter into the agreement with the *Bombay Bank*, you may embarrass us very much with reference to further proceedings;" because, be it observed, the resolution for winding up had not been passed, without which the amalgamation could not

V.-C. W. 1871

WRIGHT'S CASE.

allotted and paid upon by me." Re-examined: "From the first whenever I heard of the amalgamation I had an objection to have anything to do with the company; from the period when I had my money back I had nothing whatever to do with the company."

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be accomplished, "and we had better take your surrender." I apprehend it would be perfectly legitimate, and there would be no fraudulent abuse of the 39th article, such as Mr. *Higgins* has suggested, with which the Court would know always how to deal, in dealing with these persons, who object to the union on the terms mentioned of taking a surrender of their shares, but allowing them back their deposit, without interest. That is a bargain that might fairly be made, and I see nothing to satisfy me that that would be fraudulent.

Further than that, we were pressed with certain cases which say, it is not the course of directors, who ought to deliberate on matters of this kind, to let off a large body of shareholders without distinction, especially where it is a case of improper exercise of the discretion vested in them. I quite agree with that observation when the Court is satisfied that there is *mala fides* exhibited by that very circumstance. But the whole case turns on *mala fides*. If all are to be exempted on the same ground from the difficulties that they are placed in, not being able to obtain a settling-day after having said that 80,000 shares are subscribed for, which in itself would seem to involve the necessity of appointing a settling-day; after making that statement, they might see grave and serious difficulties in the way of these discontented shareholders continuing members of the company, and might say that all persons in that category are entitled to their release. If they could do that, it is none the worse for their having taken the opinion of a body of shareholders. In this part of the case I am assuming that that third resolution is *ultrà vires*. Still the directors are not in a worse position because the shareholders then and there assembled, so far as they are concerned, thought it was a very judicious act to be done. If the directors had the power of doing it under the articles of association, they cannot have the less authority for so doing because a body of shareholders have expressed their own opinion that it was a right and proper transaction.

Then the question is, Have the directors done it? I think there can be no doubt as to that. The letter that is written on the 20th of October, and sent to all these shareholders (to Mr. *Wright* among others), is this:—"Sir,—In calling your attention to the enclosed resolutions of the general meeting of this company, held on the 16th instant, I am desired by the directors to express their full confidence in the success of the amalgamated banks"—I merely notice in passing, that that bears out what I said about the *bona fides*; there is no intention on the part of these gentlemen to get off because they are mixed up with an insolvent concern—"and their hope that you will elect to continue a member. But should you desire to avail yourself of the option given in the third resolution, you will be required to do so within fifteen days from the date hereof, by returning, on or after the 1st of November next, to me, at the above address," such and such documents. Therefore the secretary informs this gentleman that the

On the 19th of December, 1870, a summons was taken out on behalf of *Joseph Wright* asking that his name, which had been settled *ex parte* by the liquidators on the list of contributories as a past member of the bank, the present members having been

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directors have, in compliance with the wish expressed, formally or informally, by the shareholders, thought fit to offer him this option. The directors authorize him to send this letter; and I take it, though we find no entry of a meeting of the directors on the subject, Mr. *Wright* is entitled to say, "I received a letter, telling me the directors have authorized the secretary to send me the option, and I availed myself of that option. That option I acted on, and I am not to be told that there was something informal on the part of the directors—that they did not have the meeting, or that they have not entered the meeting formally in their books, which it was no part of my business to know." The letter is not simply by the secretary, saying he was ordered by the directors to write it, which would be open to great objections, but it is the consequential act which follows on that; the secretary says the directors told me to do it, and when that option is exercised it is entered in the books of the company, which I must take to be by order of the directors, or else there would be no safety for persons dealing with shareholders or otherwise.

Mr. *Jessel* pressed upon us, which I think an examination would hardly bear out, that the circumstance of introducing the fifteen days seemed to indicate that there must have been a meeting and consultation with reference to making that variance. I do not doubt that there must have been a meeting before the 20th of October for the purpose of fixing the meeting, because we shall find the next letter altering the mode of meeting with reference to that transaction. The 6th of November would be just seventeen days after this letter, and they might well wish to have been informed two days before the meeting what parties meant to do. Then comes the letter which Mr. *Higgins* relied on, of the 20th of October, which gave notice to Mr. *Wright* that the company was about to be dissolved. The notice is this:—"Notice is hereby given, that in consequence of the amalgamation of this company with the *London and Bombay Bank*, which was unanimously approved at an extraordinary general meeting of this company, held on the 16th instant, an extraordinary general meeting of this company will be held at the *Baltic Sale Rooms*, on Monday, the 6th of November, 1865, at the hour of one o'clock in the afternoon; at which meeting it is intended to propose a special resolution requiring the company to be wound up voluntarily." Just observe what Mr. *Wright's* position is. Mr. *Higgins* says: "You knew that the company was about to be wound up at the very same time that you were offered to be released from your shares." First comes the remark I have already made, that he knew it was for the purpose of entering into a very successful combination, and that nobody intended a fraud in any way with reference to the option offered and accepted. But then look at his position on the other hand. There is to be a meeting on the 6th of November, we want your answer, and must have it, because it will be very important to know who are going to remain members and who are not. If you accept the option, we will exclude you from the

V.-C. W. 1871

WRIGHT'S CASE.

exhausted, might be struck out of such list, and that the costs of the application might be paid by the liquidators.

The summons was adjourned into Court, and now came on to be heard.

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meeting. I cannot agree with Mr. *Higgins*, that this is a notice that the company will be dissolved; but it is, that the company are going to consider whether they will be dissolved or not, and Mr. *Wright* would be entitled to say, I must have a voice at that meeting; and the shareholders may at the last moment throw difficulties in the way of the proposed arrangement, if they were so minded, by declining to sanction at these two meetings the winding-up; and, of course, it was very desirable that the directors should exclude all those gentlemen from the company, and say, let us take a vote among our own people, who are friendly to it, and who desire this arrangement to be carried into effect. Nothing could be more unjust, as it seems to me, than to say to this gentleman, who had his money returned, "We knew that there was a clause in the deed which authosized the directors to accept a surrender of his shares on any terms they thought proper. We have accepted that offer, and you are not entitled to make your appearance at the meeting of the 6th of November; but it was a fraudulent exercise of the power, or the fraudulent surrender by these gentlemen, the directors, in contemplation of dissolution." The only contemplation being for the purpose of uniting with another company, and the offer to him being one by which he was prevented from having any voice in the matter. It appears to me, therefore, that, under that 39th article, there was a clear power in the directors to do what they have done, and that there is nothing in the shape of *mala fides* to be imputed to the directors.

I am not unmindful of the argument of Mr. *Higgins* (who has argued this case very ably and fully) that the directors might have had their own motives in this matter, regard being had to the singular position in which they were put concerning this extraordinary transaction, but which, as I do not decide the case on them, I do not further characterise. Mr. *Higgins* said they might have thought that they were in a difficulty, and come to some resolution in consequence of that difficulty. But in answer to that it must be observed that all the shareholders, those who abstained from the irregularity of notice as well as those who did not abstain, had notice of this, that there was no settling-day. That fact every one of them knew, and I apprehend that in that state of things they could not find fault, as they did not find fault, with anything the directors had done. From that 2nd of November down to June, when the voluntary winding-up was ordered to be continued under the supervision of the Court, nothing was done to make Mr. *Wright* responsible — not indeed till April, 1867.

I think we ought not, at this moment, to go into the case of how it might stand as regards the creditors if Class A were exhausted. The authorities clearly show that this is not the proper time for settling Class B. When that time shall come the question of fraud might become an important element in the case, but I do not think at the present moment it is necessary to go into that.

It appears to me the order of the Vice-Chancellor must be discharged, and that Mr. *Wright* must have the

Mr. *Jessel*, Q.C., Mr. *Karslake*, Q.C., and Mr. *Everitt*, for the applicant:—

Mr. *Wright* was induced to take shares in this bank upon a representation that 80,000 shares had been subscribed for; the directors

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costs of the application out of the assets of the company. Of course, the official liquidator must have his costs also.

SIR C. J. SELWYN, L.J.:—

I am of the same opinion, and I think it only material to add, that we are not called on to decide, and must not be considered as intending to decide, any question as to the liability of Mr. *Wright* as a past member of the company, or any question of his liability up to the 2nd of November, 1865. But I do not think it necessary to insert in our order any statement that it is to be without prejudice to any such question, for the practice of the Court for many years past has been, even under the first Act of 1848, not to settle any second list of contributories consisting of past members until it has been shewn that the present members are unable to satisfy the debts of the company. This practice has existed ever since *Sutton's Case* (3 De G. & Sm. 262) and applies not only to companies wound up under the Act of 1848, but to companies registered under the Act of 1848 and wound up under the Act of 1862, and to companies both formed and wound up under the Act of 1862. I think this practice is so well settled that it would not be right to introduce into the present order any words that might cast a doubt on it—to depart in any way from such a practice would be objectionable.

I will only add, with respect to notice, that I think in the argument, the decision in *In re Bridport Old Brewery Company* (Law Rep. 2 Ch. 191) has been pressed much too far as being applicable to or decisive on the present case. I think that decision merely goes to the extent that the shareholders must have proper notice on the subject of that which is proposed to be done. Lord Justice *Turner* expressly states that he does not think it necessary that the notice should follow the precise terms of the Companies Act, and it is obvious that if these notices are to be construed with excessive strictness, and mere technicalities are to be introduced into their consideration, the very relief which is intended to be given to shareholders, and which requires notice for their protection, would become a means of extreme injustice being done. It was urged in argument that this notice was framed in fraud, but it must be borne in mind that it was obvious to every shareholder at all conversant with the affairs of the company that it was absolutely impossible the day before the meeting, or within a short time, to obtain the consent of every shareholder, and that some provision was necessary to be made to meet the case of those who did not assent, and the resolution, afterwards come to and acted on, and which remained extant for a very long time, appears to me free from any question of fraud.

I agree, therefore, with the Lord Justice, that Mr. *Wright's* name must be removed from the list of contributories, and I think that his costs, both here and below, as well as of the official liquidator, must be paid out of the assets of the company.

Mr. *Higgins*:—Your Lordships think

V.-C. W. 1871 WRIGHT'S CASE.

knowing that that was not true. This case is distinguishable from *Oakes* v. *Turquand* (1), as the name of Mr. *Wright* was removed from the register of shareholders four days before the resolution for the voluntary winding-up, and that fact brings this case within the principle of the decision in *Smith* v. *Reese River Company* (2), that if a man has a voidable contract, but not a void one, it remains valid until it is rescinded. The Lords Justices, in 1868, decided that as the directors had power to accept a surrender of shares under Art. 39 (3), therefore what they did under the authority of the general meeting was in substance the same thing, though it was in form a cancellation of the allotment. Their Lordships followed the ruling in the *Western Bank of Scotland* v. *Addie* (4). The name being off the register before the winding-up there would not be the same difficulty in deciding this application as there was in *Oakes* v. *Turquand*. The creditors of the bank have no right to say that the doctrine of liability of partnership applies. If there be a conflict in the recent decisions, the later must now guide the Court, and Mr. *Wright* is fairly entitled to urge that the question of fraud must settle the question here. In *Ross* v. *Estates Investment Company* (5), it was held that the Plaintiff, who had taken shares on the faith of the prospectus, and had filed his bill before any proceedings for winding up the company, was entitled to relief on the ground of misrepresentation. Mr. *Wright* had a right to, and did, repudiate his shares, and the directors were bound to rescind the contract. If a man claims rescission before a winding-up, though he may not get it until after, he will be entitled to it, and intervening creditors have no equity which enables them to say that he was a common partner, but the case of Mr. *Wright* is stronger than those of *Smith* v. *Reese River Company* and *Ross* v. *Estates Investment Company*, because the cancellation was before

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it is not necessary to add the words "without prejudice?"

The LORD JUSTICE WOOD:—I think not.

The LORD JUSTICE SELWYN:—I think it is not only unnecessary, but would be very injurious. It would be throwing a doubt on the well-established practice of the Court.

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(1) Law Rep. 2 H. L. 325.
(2) Ibid. 2 Eq. 264; Ibid. 2 Ch. 604; Ibid. 4 H. L. 64.
(3) See *ante*, p. 334.
(4) Law Rep. 1 H. L., Sc. 145.
(5) Ibid. 3 Ch. 682.

(7 SC 12 Jur NS 616

the winding-up, and therefore he is entitled to have his name removed from the "B" list.

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the liquidators:—

The only question is, whether Mr. *Wright* was a member of the company, and if he was, he having been relieved as a present member, must be settled upon the "B" list of contributories: *Companies Act*, 1862, s. 32. The liquidators are not in a position to dispute that there was a misstatement in the prospectus, but they cannot admit that such a misrepresentation enabled Mr. *Wright* to repudiate his shares; nor that any circumstance was omitted from the prospectus which in such a case would have enabled him, had he come in time, to have the contract rescinded as between himself and the company. But, in fact, Mr. *Wright* has never repudiated his shares, nor taken any proceedings in this Court. In *Smith* v. *Reese River Company* (1) the decision proceeded upon a clear contract. Here Mr. *Wright* has acquiesced in the retention of his name upon the register. The alleged cancellation proceeded upon the footing that he was a shareholder, and the Lords Justices dealt with him as such, and held that what had been done was in the nature of a voluntary arrangement as upon a surrender. The directors had, however, no authority, either by the Act of 1862, or by the articles of association, to cancel the shares: *Martin's Case* (2).

It was too late in October, 1865, for Mr. *Wright* to repudiate his shares. Everything that took place in October and November proceeded upon the footing that he had entered into a valid contract. Those who take shares in a company are bound to make themselves acquainted with the actual facts of the case: *Lawrence's Case* (3). Mr. *Wright's* name being upon the register of shareholders at the date of the winding-up, there could be no alteration in his *status*: *Companies Act*, 1862, ss. 131, 153; *Kent* v. *Freehold Land and Brickmaking Company* (4). Mr. *Wright* must shew that from the time when "allotment cancelled" was written he ceased to be a shareholder, precisely as if there had been a transfer or a forfeiture of his shares. The word "cancellation" is not to be found in the articles, but the word "can-

12 Jun 1868

(1) Law Rep. 2 Eq. 264; Ibid. 2 Ch. 604; Ibid. 4 H. L. 64.

(2) 2 H. & M. 669. (3) Law Rep. 2 Ch. 412. (4) Law Rep. 3 Ch. 493.

11 Jun 1635

V.-C. W. 1871

WRIGHT'S CASE.

celled" was used in Arts. 34 and 35, which related to forfeited shares (1). There has been no decision on the point as to the surrender of shares, but it is submitted that a person who has surrendered cannot be in a better position than he who has forfeited or transferred his shares. Though Mr. *Wright's* name has been struck off the "A" list, still he is, as a past member, liable to be placed on the "B" list: *Bridger's Case and Neill's Case* (2); *Creyke's Case* (3). The Lords Justices in their judgments said the proper time had not come for settling Class "B," and would not dispose of the question. Their Lordships' decision proceeded wholly upon the power of the directors to take a surrender. Mr. *Wright* was clearly a member from June to November. He may have been in a position to file a bill, but he did not do it. The directors had no power to cancel these shares, and all that they did was to return him his money. Nothing which can be done will extinguish the rights of creditors. The decision in *Smith* v. *Reese River Company* (4) is in the liquidators' favour.

[Mr. *Jessel* referred to *Pawle's Case* (5), where the name of the shareholder was taken off the register *ab initio*.]

That was a very special case. In *Ashley's Case* (6), where there was a decision in the winding-up of the same company, there was an important distinction drawn between it and *Pawle's Case*. The directors could not take Mr. *Wright's* name off the register, but they should have come and asked the Court to do it. It is material to allege and prove fraud in the contract, but there is no such statement in this case. *Ex parte Stevenson* (7) expressly decides that there must be an active proceeding by the shareholder, but from June to November Mr. *Wright* took no active step whatever, except to enter into an agreement with the directors, which was *ultrà vires*, and as between himself and the creditors he cannot successfully contend that he is not a shareholder, and therefore he ought to be continued on the "B" list.

Mr. *Jessel*, in reply, contended that the decision in *Pawle's Case*

(1) See *ante*, p. 334.
(2) Law Rep. 4 Ch. 266.
(3) Ibid. 5 Ch. 63.
(4) Law Rep. 2 Eq. 264; Ibid. 2 Ch. 604; Ibid. 4 H. L. 64.
(5) Law Rep. 4 Ch. 497.
(6) Law Rep. 9 Eq. 263.
(7) 16 W. R. 95.

was a distinct authority for taking Mr. *Wright's* name off the "B" list of contributories. He had a right to have his shares cancelled; the directors did that for him, and the liquidators cannot now successfully contend that they were not cancelled. A contract which a man was induced to enter into by fraud was in equity void, and if the Court would follow out the observations of the Lord Chancellor to their legitimate conclusion, it would be found that it came to this: having discovered the fraud, there was no contract—the contract was got rid of. It was a mistake to suppose that the contract was good for a time, for a contract which was void was so from the beginning, and therefore the name ought to be removed.

June 26. SIR JOHN WICKENS, V.C.:—

This is an application by *Joseph Wright* to have his name removed from the "B" list of contributories, in which it has been placed by the liquidators of the *London and Mediterranean Bank, Limited.*

On the 4th of May, 1865, Mr. *Wright* applied for shares in the bank, on the faith of a prospectus which stated that 80,000 shares had been subscribed. This statement was material, and appears to have been untrue, but *Joseph Wright*, to whom ten shares were allotted, did not discover its falsehood until after the 22nd of November, 1865, when the winding up of the company commenced. It was suggested that he might have known it before, if he had taken reasonable advantage of his means of knowledge. But the circumstances do not seem to warrant this suggestion. For anything that appears, Mr. *Wright*, if at any time before the 22nd of November, 1865, he had discovered the falsehood of the representations made to him, might have successfully filed a bill to be relieved from his contract to take shares. What actually took place was this: the committee of the *Stock Exchange*, who had somehow become aware of the fact that 80,000 shares had not been subscribed, refused an application by the directors for a settling-day. Thereupon the directors proposed to transfer the company's business to a company called the *London and Bombay Bank, Limited*, and communicated this intention to the shareholders by

V.-C. W. 1871

WRIGHT'S CASE.

a circular dated the 27th of September, 1865. In answer to this the applicant, on the 6th of October, 1865, wrote to the secretary a letter:—[His Honour read the letter set forth above.] No answer was returned to this letter: but on the 16th of October, 1865, an extraordinary general meeting of the shareholders passed resolutions approving of the agreement for transfer to the *London and Bombay Bank*:—[His Honour stated the terms of exchange recommended to the shareholders, and read the third resolution set forth above.] On the 20th of October, 1865, a circular was sent to *Joseph Wright*, and the other shareholders:—[His Honour read the letter of the secretary of this date, set forth above.] Mr. *Wright* signed the receipt annexed to that circular accordingly, and sent it to the secretary with his share certificates, receiving in return a cheque dated the 2nd of November, 1865, for £25, the amount which he had paid on allotment. And the register of shareholders was altered by setting opposite to the shares entered in his name, "Money returned and allotment cancelled." Shortly afterwards, on the 6th of November, 1865, a resolution was passed to wind up the company voluntarily, which resolution was confirmed on the 22nd of the same month. The winding-up was afterwards ordered to be continued under the supervision of the Court. On the 1st of November, 1867, a summons was taken out by the liquidators for settling Mr. *Wright* on the list of contributories as a contributory for ten shares. On the 13th of February, 1868, this application was granted by Vice-Chancellor *Stuart*. There was an appeal to the Lords Justices, who, on the 13th of March, 1868, removed his name from the list on the ground that the directors had, under the articles, a power to accept a surrender of shares, and that the so-called cancellation might be supported as tantamount to a surrender. They expressly left open the ground of fraud as one not material to the question then before them, but which might be material on the settlement of the "B" list.

It seems proper to consider, in the first instance, whether, if Mr. *Wright* had, immediately before the 6th of November, 1865, become aware of his rights, and being so, had applied to the directors to have the allotment to him cancelled, threatening to file a bill in case of refusal, they would have had power to do what he

asked. Directors in general have no power to cancel shares when duly allotted and registered, and the directors of this particular company, though they had certain powers of cancellation of shares, had no power to cancel the allotment. They might, under certain circumstances, annihilate the shares as from the time of cancellation, but not so as to put them in the position of shares which had never existed. Therefore, if Mr. *Wright* had applied to them as suggested, their power of granting the application must have been one arising from the general law, and not from anything special in the constitution of the company. An allotment of shares, founded on a contract to take them, which the shareholder has been led into by misrepresentation, is voidable, but not void, that is to say it remains good until the shareholder elects to avoid it. If the shareholder omits to exercise this right before winding-up proceedings are commenced, the contract stands. If the shareholder elects in due time and in proper form to avoid the contract, it is avoided altogether, and the case stands as if it had never been made. The question then arises whether, if a shareholder, having a case which entitles him to be discharged on bill filed, applies to the directors, and they, being satisfied of his title, admit, and to the utmost of their power give effect to his claim to be discharged, this is tantamount for the present purpose to a decree obtained adversely against them for the removal of his name from the register, or to the filing of a bill which results in such a decree. It is of course essential, in the case supposed, that the shareholder's right to discharge should be established independently altogether of the directors' admission; and should be exercised in such a way as to destroy all future claim on his part to be a shareholder in respect of the shares in question. But if these conditions are fulfilled, it is difficult to see, on principle, why the filing of a bill should make any difference.

It cannot be necessary for the directors to maintain a hopeless defence to a well-grounded claim, and the submission to an immediate decree after a bill filed can hardly be more efficacious than a submission to the same relief after the bill is prepared, but before it is filed; or after it is threatened, but before it is prepared; or after the claim is formally made, but before the bill is threatened in terms. The matter, however, does not rest on principle

V.-C. W. 1871

WRIGHT'S CASE.

merely. For *Pawle's Case* (1) seems to determine that an agreement by the directors to abide by the determination of a suit by one shareholder as governing the case of another is as effectual for the exoneration of the latter as if he had filed a bill of his own. This seems necessarily to involve that if the suit actually instituted had been determined before the winding-up, the directors might have acted on the decision by cancelling the shares *ab initio*. In this case it seems probable that the directors knew, or might have known, of Mr. *Wright's* title to cancellation when they cancelled his shares, though they cancelled them on other grounds. It has already been determined that the cancellation so granted was valid, at least as a surrender, and therefore destroyed all future claim on the shareholder's part to any benefit from his shares. It was intended by both parties to put him in the same position as if he had never been on the register. And the election of the shareholder to treat the voidable contract as void was finally made as far as he was concerned, though he did not know his own title, and the acceptance by the directors of his repudiation of the original allotment purported to be made on grounds which did not warrant it:—[His Honour referred to the cross-examination set forth above.] The legal effect of this remains to be considered, and involves, in my judgment, a question of some difficulty. Of course, if the Lords Justices, when the appeal was before them, had intimated any opinion on the point, I should consider myself bound by it. But on a fair construction of what they are reported to have said, this seems to me not to have been the case. The question appears not to be concluded either by their judgments or by any other authority. It cannot, I think, be material in any view of the case, whether any one searching the register immediately before the winding-up would have found Mr. *Wright's* name on it or not. The question really is whether, before the winding-up, he had effectually exercised his right to repudiate the allotment as one which he had been fraudulently induced to accept.

The true view, on principle, seems to me to be that taken by Vice-Chancellor *Stuart*, that is to say, to consider the cancellation and the acceptance back of the £25, the sum paid on allotment (without interest), as founded only on the resolution on which they

(1) Law Rep. 4 Ch. 497.

in fact proceeded, and the resolution as nothing more than an attempt to give all persons who were actually allottees an option of retirement, if they wanted to get out of the concern; but not to have amounted to any admission or implied acknowledgment, or involved an assumption that they or any of them were otherwise than persons to whom shares had been duly allotted. If Mr. *Wright*, knowing his case as a person induced to take shares by misrepresentation, had accepted this mode of getting out, it surely could not have been held an effective election to treat the original allotment as fraudulent. He accepted it without knowledge and without inquiry: and as no doubt he thought it effectual he would probably, I conceive, have accepted it if he had possessed a full knowledge of the circumstances, and had had to choose between the acceptance of it and that of filing a bill. At any rate, it lies on him to shew that a concluded election to have his allotment cancelled on the ground of misrepresentation was made before the 22nd of November. And if no such election was in fact made by him, and if his ignorance up to the 22nd of November of his rights in this respect does not help him (as it clearly does not), no inference arises, and it seems difficult to infer that an act which assumed on the face of it the allotment to have been properly made (or at any rate did not assume the contrary), was an unwitting election to treat it as improperly made, because he may have thought, and probably did think, that it involved nearly the same result. The true view, I think, is, that there was no election at all which would relieve Mr. *Wright* from his liability to be placed on the "B" list, and that he was properly placed there.

The summons must therefore be dismissed. But as the case is one of difficulty, and of considerable hardship on Mr. *Wright*, there will be no order as to costs.

Solicitors: Messrs. *Lewis, Munns, & Longden*; Mr. *Henry Harris.*

C. J. B.
1871
May 9, 22, 29.

Ex parte UNION BANK OF MANCHESTER.
In re JACKSON.

Bankruptcy Act, 1869, s. 15, *sub-s.* 5—*Things in Action—Shares in Joint Stock Gas Company—Equitable Mortgage—True Owner—Order and Disposition—Notice.*

Shares in a company are not things in action within sect. 15, sub-sect. 5 of the *Bankruptcy Act*, 1869.

A debtor, a trader, deposited with a bank the certificates of five shares in a gas company to secure the balance of his account current. The bank gave no notice to the company of the deposit thus made. The debtor became bankrupt, and the Registrar, acting for the County Court Judge, ordered the bank to deliver up the shares to the trustee:—

Held, that the bank was the true owner of the shares to the extent of the mortgage, and that the order had been properly made.

THIS was an appeal from an order made on the 12th of April by the Registrar of the County Court at *Crewe*, acting for the Judge of that Court, whereby the Appellants, the *Union Bank of Manchester, Limited*, were ordered to deliver up to the trustee of the bankrupt's estate the certificates of five shares in the *Middlewich Gaslight and Coke Company*, incorporated under 7 & 8 Vict. c. 110.

The facts were as follows:—*Jackson*, a trader, being the owner of five shares in the above-named company, deposited in the month of June, 1868, the certificates of those shares with the Appellants, the *Union Bank of Manchester*, to secure the balance of his account current.

Jackson afterwards became bankrupt.

The bank gave no notice to the company of the deposit thus made till after the adjudication of bankruptcy, and the shares at the time of the Petition and adjudication stood in the company's share register in the name of the bankrupt.

The Registrar ordered the bank to deliver up the certificates to the trustee. The bank appealed against this order.

Mr. *Robson*, for the Appellants:—

Are the shares in question things in action or personal goods and chattels? In *Ryall* v. *Rowles* (1), Lord *Hardwick* held that

(1) 1 Ves. Sen. 348, 370; 1 Atk. 165, 181.

choses in action were goods and chattels within the statute of Jas. 1, c. 19, ss. 10, 11.

The right of a partner in a partnership is a *chose in action*, enforceable by a bill in equity: *Darby* v. *Darby* (1); *Small* v. *Oudley* (2).

In what way does a shareholder in a company differ from a partner?

In *Humble* v. *Mitchell* (3), Lord *Denman* said shares in a joint stock company are mere *choses in action.*

Stock, as being a *chose in action*, is not liable to be taken in execution: *Dundas* v. *Dutens* (4).

The CHIEF JUDGE requested Counsel for the trustee to satisfy him that the mortgagee in this case was the true owner within the meaning of sect. 15, sub-sect. 5 of the *Bankruptcy Act*, 1869.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the trustee:—

The equitable mortgagee is the true owner within the meaning of this sub-section. A deposit by way of equitable mortgage is as much a mortgage as if it were an assignment; a deposit of title-deeds is as good a mortgage as can be made.

In the case of an equitable mortgage of shares, if the mortgagee does not give notice, he is the true owner to the extent of his mortgage; but the shares are in the order and disposition of the bankrupt: *Ex parte Vallance* (5); *Ex parte Harrison* (6); *Ex parte Richardson* (7); *Edwards* v. *Martin* (8); *Ex parte Bolton* (9); *Ex parte Stewart* (10).

If an assignee in bankruptcy is assignee for value, the case is within *Dearle* v. *Hall* (11) and *Loveridge* v. *Cooper* (12); and we are entitled either under *Dearle* v. *Hall* or the reputed ownership clause.

In case the question of reputed ownership arises, the question is, are shares in a public company *choses in action* within the meaning of sect. 15, sub-sect. 5 of the *Bankruptcy Act*, 1869?

(1) 3 Drew. 495, 503. 2 Jur NS 371
(2) 2 P. Wms. 427.
(3) 11 A. & E. 205, 208.
(4) 1 Ves. 196.
(5) 3 Mont. & A. 224.
(6) Ibid. 506.
(7) 3 Deac. 496.
(8) Law Rep. 1 Eq. 121.
(9) 1 De G. & J. 163. 3 Jur NS 425.
(10) 11 L. T. (N.S.) 554.
(11) 3 Russ. 1.
(12) Ibid. 30.

C. J. B. 1871

Ex parte UNION BANK OF MANCHESTER. *In re* JACKSON.

In the case of *Humble* v. *Mitchell* (1), the remark that shares in a joint stock company were mere *choses in action* was only a *dictum* of Lord *Denman's*.

The definition of the term "*choses in action*" is found in *Termes de la Ley*, *Kerr's Blackstone* (2); *Williams* on Executors (3); *Williams* on Personal Property (4); *Lindley* on Partnership (5): *The Trustee Act*, 1850 (13 & 14 Vict. c. 60, ss. 22, 23, 31, 35, 46); *The Bills of Sale Act*, 1854 (17 & 18 Vict. c. 36, s. 7); and the *Bankruptcy Act*, 1869, s. 22. Shares tranferable or assignable are not *choses in action*.

The real question is, to whom does the property belong. Who is the real owner, and who is the apparent owner?

If the depositee is not the real owner, the bankrupt must be the real owner; and in that case, by sect. 15, interpreted by aid of sect. 4, the shares are property vested in the bankrupt at the commencement of the bankruptcy, and by sect. 22 the stock is vested in the trustee to the same extent as in the bankrupt previously to the bankruptcy.

The title of the trustee to property vested in the bankrupt at the date of adjudication, may be affected by outstanding interests; but can only be so affected if notice has been given of such interests to the proper parties.

The trustee is purchaser for value, and so takes precedence over a mortgagee who has not given notice of his security. The object of the Act was to put questions of title to property on an intelligible basis.

Mr. *Robson*, in reply:—

The trustee takes the same rights as the bankrupt, and is subject to the same equities. There is a material difference between the assignee in bankruptcy and the assignee for value: *In re Barr's Trusts* (6); *In re Atkinson's Trusts* (7); *Mitford* v. *Mitford* (8). In no way does the present Act give him a better title.

The object of the Legislature was, by the *Bankruptcy Act*, 1869,

(1) 11 A. & E. 205, 208.
(2) Vol. ii. p. 403.
(3) 6th Ed. p. 738.
(4) 7th Ed. p. 198.
(5) Vol. i. p. 663.
(6) 4 K. & J. 219.
(7) 2 D. M. & G. 140.
(8) 9 Ves. 87.

to make a change in the law with reference to the doctrine of reputed ownership, and to confine its effect to visible property, and to what gives a spurious credit, and so to overrule *Ryall* v. *Rowle* (1), which carried the question of reputed ownership too far.

SIR JAMES BACON, C.J.:—

The "order and disposition" clause has been frequently objected to and reprobated, yet from the commencement of bankruptcy law it has been maintained as a principle that property suffered to remain in the visible possession of the bankrupt is divisible among his creditors, and so the law is now. I had at first doubts whether the equitable mortgagee in this case was the true owner; but my doubts have been removed by the series of decisions quoted by Mr. *De Gex*, in which the mortgagee has been held to be the true owner.

In order, however, to have perfected his title against the trustee, the mortgagee ought to have given notice to the company. No such notice was given; but it has been argued that the trustee cannot stand in a better position than the bankrupt would have been in if he had not become bankrupt. This is not the case, as the statute confers upon the trustee a different title altogether. *Mitford* v. *Mitford* (2), referred to by Mr. *Robson*, does not apply, and has nothing to do with the order and disposition clause, under which the trustee claims. *Ex parte Stewart* (3) establishes that a deposit makes an equitable mortgage, but that notice is necessary to take it out of the order and disposition clause; in that case notice had been given, and therefore the title of the mortgagee prevailed.

The next question is, are shares in this joint stock company things in action within the meaning of sect. 15, sub-sect. 5 of the *Bankruptcy Act*, 1869. If the intention of the framers of the Act was to exclude from the operation of this sub-section everything incapable of manual delivery, other and clearer terms would have been used. So large a change in the law should not have been made in so small a compass. No action need be brought in respect of these shares. The owner's title depends upon the register. He

(1) 1 Ves. Sen. 348, 370; 1 Atk. 165, 181.
(2) 9 Ves. 87.
(3) 11 L. T. (N.S.) 554.

C. J. B. 1871 *Ex parte* UNION BANK OF MANCHESTER. *In re* JACKSON.

is competent to sell, part with, bequeath, or give them away, as part of his estate. They are not things in action at all, but are as much the bankrupt's property as if they had been freehold estate. The 22nd section of the *Bankruptcy Act*, 1869, is not conclusive, but worthy of observation in the interpretation of the term "things in action." I wish it to be understood that I decide nothing but that the shares in question are not things in action within the meaning of sect. 15, sub-sect. 5 of the *Bankruptcy Act*, 1869. I make no order as to costs.

Appeal dismissed without costs.

Solicitors: Messrs. *C. & C. R. Cuff*, agents for Mr. *Cheshire, Northwich*; Messrs. *Milne, Riddle, & Mellor*, agents for Mr. *John H. Cooke, Middlewich.*

C. J. B. 1871 *June* 19, 26.

Ex parte BLACKBURN. *In re* CHEESEBROUGH.

Bankruptcy Act, 1869, *s.* 92—*Fraudulent Preference—Payee receiving in good faith.*

Payment a few days before stopping payment, and less than three months before bankruptcy, by an agent to his principal of a sum of money payable in the ordinary course of business, without any intention to prefer such creditor being proved:—

Held, not a fraudulent preference within the meaning of the 92nd section of the *Bankruptcy Act*, 1869.

A creditor receiving payment of a sum due to him without any knowledge of the insolvent condition of the debtor's affairs, is within the exception contained in the last part of the same section.

THIS was an appeal by the trustee against an order made on the 9th of May last, by the County Court Judge at *Bradford*, dismissing a motion by which the trustee sought to have it declared that a payment of £912 8*s.* 4*d.*, made on the 16th of August, 1870, by the bankrupts to *Thomas P. Hitchcock*, was void on the ground "of such payment being made by the bankrupts when unable to pay their debts as they became due from their own moneys, in favour of the said *Thomas P. Hitchcock*, with a view of giving him a pre-

ference over the other creditors of the said bankrupts, within three months of the date of the order of adjudication, and that such payment was fraudulent and void as against the trustee" within the meaning of the 92nd section of the *Bankruptcy Act*, 1869 (1), and praying for an order directing that such sum might be repaid to the trustee by the said *Thomas P. Hitchcock*.

The facts were as follows:—

The bankrupts carried on business in copartnership together, at *Bradford*, as woolstaplers, commission agents, and merchants, under the firm of *W. Cheesebrough & Son*, for many years prior and up to the 19th of August, 1870, on which day they stopped payment. A petition for liquidation by arrangement was immediately afterwards presented by them, and on the 9th of September, 1870, at a meeting of creditors held under the petition, it was resolved that the estate should be wound up in bankruptcy, and not by arrangement. A creditors' petition for adjudication was then presented, under which they were, on the 13th of September, 1870, duly declared bankrupts. The Respondent *Hitchcock* was a wool merchant residing at *Lavenham*, in *Suffolk*, and had for many years been in the habit of consigning wool to the bankrupts, for sale on a *del credere* commission. Some time previously to August, 1858, the bankrupts had failed, and afterwards resumed business; and on the 30th of August, 1858, the bankrupts wrote to *Hitchcock* as follows:—

"Dear Sir,—You will be aware that in our former business we were accustomed to receive, through two indirect channels, half-bred hogs and down tegs collected in your district. We have, some time ago, resumed business as commission agents, and from

(1) Section 92 of the *Bankruptcy Act*, 1869, is as follows: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same, become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration."

C. J. B. 1871 *Ex parte* BLACKBURN. *In re* CHEESEBROUGH.

our old established connection with the buyers in this district, and our intimate knowledge of the trade, we believe no house is better able to serve their friends well and make the best prices current for your class of wool. Half-bred hogs are at present in very good demand, and the market is thinly supplied with them. Down tegs are less inquired for, and do not sell as well in proportion. If you send us a few sheets of such wool as you may be desirous of trying our market with, you may depend upon our best attention. Our charge would be 7*s.* 6*d.* per pack commission; and our remittances would be cash within fourteen days, less three months discount for cash."

Hitchcock, soon after, consigned wool to the bankrupts for sale on the terms of the above letter, and continued to do so until the stoppage on the 19th of August, 1870, at which time the bankrupts had a quantity of his wool on hand unsold, and which, after the bankruptcy, was treated as his property, and returned to him, or disposed of according to his orders.

It appeared, from various letters, that the bankrupts communicated with, and occasionally asked for and received instructions from *Hitchcock* as to the prices at which the consigned wool was to be sold.

On the 16th of August, 1870, the bankrupts wrote to *Hitchcock* as follows:—

"Inclosed we beg to hand you cheque for £912 8*s.* 4*d.* to the credit of our account, the receipt of which please acknowledge by return of post."

In the last-mentioned letter there was inclosed a cheque for £912 8*s.* 4*d.*, being the balance of the moneys received by the bankrupts on account of wools sold by them for *Hitchcock*, and which *Hitchcock*, as he stated in his affidavit, "received from them in perfect good faith, believing that it had been received by them for me as my agents in the sale of my wool, and that a large part had been so received in consequence of sales made in accordance with the directions given by me." In the same letter there was also inclosed an account which represented sales as made on the 11th, 18th, and 23rd of May, and 13th and 15th of August, and the bankrupts took credit for interest and commission upon the footing of

the terms of the letter of the 30th of August, 1858, as applicable to the dates of sales as appearing in the account.

Hitchcock's affidavit also contained the following statements:—

"I have been informed since the bankruptcy that the sales advised to me on the 16th of August as made the previous day had really been effected during the previous months of May and June, and that the bankrupts had received bills of exchange for the wool so sold, and had discounted the same, and made use of the proceeds in their business, and I say that such dealings with my property, if they took place, were wholly without my sanction, and that I had no knowledge of the receipt of such moneys, and at the time I received that account I believed it to be correct as to dates and other particulars. I had no occasion to suspect the contrary. I had no knowledge of the position of the bankrupts at the time I received the cheque in question, and I believed them to be highly respectable and responsible men; and, relying on their integrity, I intrusted them with my wool to sell for me, and I received the cheque for £912 8*s.* 4*d.* in perfect good faith, as being the proceeds of part of the wool I had intrusted to them to sell for me. At the time I received this cheque for £912 8*s.* 4*d.* I had no immediate necessity for sending more wool for sale, but I had a large quantity of wool remaining in the hands of the bankrupts as my agents, and I should have left the same with them for sale if it had not been for their stopping a few days afterwards."

It was urged on the part of the Appellant that, by the usage of the *Bradford* market, where the factor is intrusted to sell on a *del credere* commission, the proceeds of the goods, when sold, become the property of the factor, although the goods, as long as they remain in specie, are the property of the consignor, and affidavits were filed in support and against this alleged custom.

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant:—

Primâ facie, this payment was a fraudulent preference, as it was made by the bankrupts when their affairs were in a hopelessly insolvent condition. The learned Judge thought that on two grounds the payment must be supported: first, that the relation of principal and factor was established between *Hitchcock* and the

C. J. B. 1871 *Ex parte* BLACKBURN. *In re* CHEESEBROUGH.

bankrupts; secondly, that the bankrupts did not think that they were hopelessly insolvent. As to the first objection, the evidence shews that the factor treated the wool as his own, that he paid the money received on the sale of it into his own account, and *Ex parte White* (1) shews that in transactions similar to this the so-called factor is in reality a purchaser from his consignor. The custom of the *Bradford* market shews that a wool factor always treated the money received from the sale of wool as his own. If the factor is paid by a bill, he discounts the same, which he would not be at liberty to do if he was merely a factor. If the relation of trustee and *cestui que trust* did exist, none of the moneys can be traced, and a debt arising from a breach of trust is on the same footing as any other debt under the bankruptcy law: *Wilson* v. *Balfour* (2).

As to the second objection, it is immaterial whether the payment was made in contemplation of bankruptcy or not, as by sect. 92 of the *Bankruptcy Act*, 1869, it is enacted that the payment shall be deemed fraudulent and void as against the trustee if bankruptcy occur within three months: *Robson* on Bankruptcy (3). If, however, it is still necessary to consider whether or not it was made in contemplation of bankruptcy, we must be guided by the principles of the old law, by which this payment would clearly be considered as being so made: *Nunes* v. *Carter* (4); *Gibson* v. *Boutts* (5); *Aldred* v. *Constable* (6); *Marshall* v. *Lamb* (7). If the exception at the end of the 92nd section is to be construed in its widest meaning, such a thing as a fraudulent preference, as formerly known, could hardly exist. Nearly every payee is ignorant of the state of his debtor's affairs, and the words "in good faith" must be extended to the payer, and "valuable consideration" must be taken to mean present and not past consideration, which would be available to the other creditors.

Mr. *Little*, Q.C., and Mr. *Winslow*, for the Respondent, were not called upon.

(1) Law Rep. 6 Ch. 397.
(2) 2 Camp. 579.
(3) Page 118.
(4) Law Rep. 1 P. C. 342.
(5) 3 Scott, 229.
(6) 4 Q. B. 674.
(7) 5 Q. B. 115.

SIR JAMES BACON, C.J., after stating the nature of the application, and the decision of the County Court Judge, continued :—

Although the *Bankruptcy Act*, 1869, is the first statute which contains an express and direct enactment upon the subject which has long been known and called and dealt with by the name of "fraudulent preference," and although that statute lays down the law in phrases not used in the preceding statutes, I have no reason to think it introduces in effect any new principle applicable to the subject. Before that Act it was necessary, in order to constitute fraudulent preference, that two things should concur —the payment must have been voluntary on the part of the creditor, and it must have been in contemplation of bankruptcy. With respect to the first of these conditions, the current of the more recent decisions had established that an earnest request by a creditor, although not accompanied by a threat or remonstrance or very positive demand, would be enough to deprive the payment of that voluntary character which would tend to make it impeachable; and with regard to the second, that where a man was in such a hopeless state of insolvency as that it was impossible for him to satisfy his creditors or to carry on his business, he must be held to have contemplated bankruptcy; and upon these principles it was that juries, before whom such questions commonly arose, were directed by the Judges to consider whether, upon the facts proved, the just inference was that a fraudulent preference had been made or intended by the debtor. There are very numerous cases in which the question has been raised, and the circumstances have been various, and frequently complicated and nice; but in all of them the principles I have adverted to have regulated the decisions.

It has, however, never, that I know of, been suggested that a payment in the ordinary course of trade, the honouring bills of exchange presented at their maturity, or the payment of debts which had become due in the usual and customary manner, or payments made in fulfilment of a contract or engagement to pay in a particular manner or at a particular time, were open to any objection on the ground of their being voluntary, even although they were made without any express demand by the creditor, unless, indeed, the creditor had at the time notice of an act of bankruptcy committed by the debtor. To hold otherwise would be to embarrass

C. J. B. 1871 *Ex parte* BLACKBURN. *In re* CHEESEBROUGH.

and impede the most ordinary every-day transactions of commerce, and to make it impossible for creditors to know when the payments received by them in good faith and in common course could be maintained by them or not.

It is, however, necessary to consider the express provisions of the *Bankruptcy Act*, 1869. The 92nd section provides that every payment made by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, with a view of giving such creditor a preference over the other creditors within three months of the person so paying becoming bankrupt, shall be deemed fraudulent and void as against the trustee in bankruptcy.

If the clause stopped there, it no doubt gets rid of any question which can be raised respecting the "contemplation of bankruptcy," the solution of which had sometimes created considerable difficulty. The only condition prescribed by the statute in this respect is, that the debtor be "unable to pay his debts as they become due from his own moneys," and this, be it observed, is applicable to debtors generally, whether in trade or not. But, then, it adds another qualification or condition, which is the very life and essence of the enactment, the payment so made must, in order to be void, be made "in favour of any creditor with a view of giving such creditor a preference over the other creditors." So that unless it can be made clearly apparent, and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favour of a creditor. The act of the debtor is alone to be considered—the object and purpose for which the payment is made can alone be inquired into—and although it is perfectly legitimate, and in all cases requisite, that all the attending circumstances should be carefully investigated, yet if the act done can be properly referred to some other motive or reason than that of giving the creditor paid a preference over the other creditors, then I conceive neither the statute, nor any principle of law or policy, will justify a Court of Law in holding that the payment is fraudulent or void. And that this must be so is, in my judgment, rendered still more plain from the subsequent provision in the same clause; for the first part of the section having

dealt only with the act and motive of the debtor, it is provided that the enactment making void the payment "shall not affect the rights of a payee in good faith and for valuable consideration," a provision which was obviously just, and not more just than necessary, in order to avoid the inconveniences which would arise in the commercial world, and even beyond its pale, if persons receiving payment of their just demands received such payment at the risk of having to refund it in consequence of the improper motive actuating their debtor, but of which motive they had no cognizance, and in which they had in no degree participated.

The suggestion of a local custom at *Bradford*, by which the wool broker became the principal, and was entitled to sell the wool as his own, to deal with the proceeds as his own, and so to free himself from the contract upon the faith of which he had been intrusted by the consignee with the goods, in my opinion wholly fails of proof as a binding custom. But if the custom had been established, it would not have affected the question; for the Appellant does not dispute that in the course of the dealing the bankrupts became indebted to Mr. *Hitchcock* in that amount which they paid him on the 16th of August; and I agree with the learned Judge that the case of *Ex parte White* (1), lately decided by the Lords Justices, and now under appeal to the House of Lords, has no application whatever to the case now under discussion. All that their Lordships decided in that case was, that *Nevill* was debtor to *Towle* for the goods which had been consigned to him for sale, and, as a consequence, that *Towle* could not claim as a creditor against the firm of *Jourdan & Co.*, into whose hands the proceeds of the goods sold by *Nevill* had been paid. No such question arises here; but the only contention on the part of the Appellant is, that the bankrupts, the sole debtors to *Hitchcock*, have made a payment in respect of that debt, which the statute declares to be fraudulent and void. The appeal must, therefore, be dismissed with costs.

Solicitors for the Appellant: Messrs. *Flower & Nussey*, agents for Messrs. *Wood & Killick, Bradford.*

Solicitors for the Respondent: Messrs. *Harper, Broad, & Battcock*, for *Tyrer, Smith, & Kenion, Liverpool.*

(1) Law Rep. 6 Ch. 397.

M. R.

COUSENS *v.* ROSE.

1871

March 17, 20, 21; April 19.

Grant—Right of Way—Construction—Right for Person to use Roadway—Footway—Way for Horses and Carriages—Pleading—Multifariousness.

8 Ch D 418

By a lease a demise was made of a dry dock described as bounded on the west by a roadway or passage running between the dock and certain newly-erected warehouses, together with free liberty and right of way for the lessee, his workmen and servants, and all other persons and person, by his authority or permission, from time to time, and at all times thereafter during the continuance of the demise, in, by, through, and over the said roadway, lying to the west of the demised premises, jointly with the lessor and his tenants.

Between the dock and the warehouses was a strip of land of twenty-three feet in breadth. At the date of the lease that part of the strip, fourteen feet in breadth, which lay nearest to the warehouses, was paved, and there was at the extremity of the pavement a strong curb three inches high. On this curb a strong fence was erected either before or soon after the date of the lease:—

Held, that the right of way conferred by the lease extended over the whole strip, and not merely to the portion of it adjacent to the dock; but that it was confined to foot-passengers.

A bill against a person who has agreed to grant a lease to the Plaintiff, and against a tenant of the intended lessor, claiming under a lease prior to the agreement, praying for specific performance of the agreement by the lessor for a lease, and for an injunction to restrain the tenant from exercising rights over the land agreed to be leased, contrary to the terms of the agreement, is multifarious.

An objection for multifariousness ought to be taken by demurrer; it is too late to raise such an objection at the hearing.

By an indenture, dated the 7th of October, 1859, certain hereditaments at *Wapping* were demised to *Charles Winn* for a term of ninety-nine years, from the 29th of September, 1859. The hereditaments so demised were bounded on the north by *High Street, Wapping*, and on the south by the river *Thames*, and comprised a dry dock, known as *Gun Dock*, and two pieces of land on the east and west sides of it. The plot of land on the west side was of considerable dimensions, and at the date of the lease *Winn* was engaged in erecting warehouses thereon. Between the east wall of these warehouses and the west wall of the dock lay a strip of land 150 feet in length and twenty-three in breadth, or thereabouts. In January, 1860, *Winn* caused part of this strip, fourteen

feet broad, and adjacent to the warehouses, to be paved. He also caused a strong curb three inches in height to be placed at the easternmost extremity of such pavement. Some time in the year 1860, but at what precise date did not appear, *Winn* erected on this curb a strong wooden fence six feet high, having a doorway about two and a half feet in width at the south end thereof, but no other opening. The part of the property thus partitioned off, including the warehouses and the fourteen feet pavement, became known by the name of *Gun Wharf*, and in March, 1860, was agreed to be let to Messrs. *Samuel Page & Son*.

By an indenture dated the 7th of March, 1860, *Winn* demised to the Defendant *William Rose* and one *Thomas Crowder*, for a term of twenty-one years, from the 1st of February, 1860, *Gun Dock*, with the appurtenances, which premises were therein described as bounded on the east as therein mentioned, on the west "by a roadway or passage running between *Gun Dock* aforesaid and certain newly-erected warehouses lately built by the said *Charles Winn*, and let, or about to be let, by him to Messrs. *Samuel Page & Son*," on the north by *High Street, Wapping*, and on the south by the river *Thames* (which premises were delineated in a plan drawn in the margin of the indenture), "together with the free liberty and right of way and passage, and of ingress, egress, and regress to and for them and him, their and his workmen and servants, and all and every other persons and person, by their or his authority or permission, from time to time, and at all times hereafter during the continuance of this demise, in, by, through, and over the said roadway and passage lying to the west of the said premises hereby demised, jointly with the said *Charles Winn*, his executors, administrators, and assigns, and other the tenant or tenants, occupier or occupiers, of *Gun Wharf* aforesaid, his or their agents or appointees." The plan annexed to the lease did not make any distinction between the paved and unpaved portions of the strip of land lying to the west of the dock. The premises comprised in the lease afterwards became vested in *Rose* alone.

On the 8th of October, 1865, *Winn* entered into a contract with the Plaintiffs to demise to them certain hereditaments, including the premises known as *Gun Wharf*, for a term of twenty-one years. The property comprised in the lease was delineated in a plan

M. R. 1871 COUSENS v. ROSE.

annexed to the contract, and included the strip of pavement fourteen feet in breadth lying adjacent to the warehouses.

Winn died in 1868. *William Comer Scott* and *Thomas Isaac Large*, Defendants to this suit, were his legal personal representatives.

In June, 1868, the Defendant *Rose* pulled down part of the fence erected on the curb as above mentioned, and caused rubbish to be deposited on the pavement adjoining the warehouses. The bill was thereupon filed against *Rose* and the representatives of *Winn*, praying that it might be declared that the Plaintiffs were entitled, under the agreement of the 8th of October, 1865, to the exclusive use of the roadway partitioned off as aforesaid for the residue of the term of twenty-one years, agreed to be granted thereby; that the agreement might be specifically performed by the Defendants; and that the Defendants might be decreed to remove the rubbish from the roadway, and might be restrained from obstructing the same, or interfering with the Plaintiff's sole and exclusive right and user thereof, and from removing the fence so erected as aforesaid; and for damages.

The Defendant *Rose* admitted that he had no right to deposit rubbish on the pavement, but justified the pulling down of the fence, on the ground (amongst others which are not material for the purposes of this report) that he was entitled, under the lease of March, 1860, to a right of way, with horses, carts, and carriages, over the whole of the strip of land lying between the dock and the warehouses; and he alleged that that part of the strip which lay between the dock and the curb (not, however, including the fence) was comprised in the demise to *Crowder* and himself. By his answer he raised the objection that the bill was multifarious.

The Defendants *Scott* and *Large* stated that part of the property comprised in the agreement of the 8th of October, 1865, was held by *Winn* under a lease containing a covenant not to assign without the consent in writing of the lessor; that they had not sanctioned in any way the acts complained of by the bill; that they had never resisted specific performance of the agreement, except so far as might be contrary to the covenants by which the representatives of *Winn* were bound; and that they were, and always had been, ready and willing to grant a lease of the property comprised in

the agreement, with the consent of such lessor as aforesaid, if and when the same should be obtained.

The cause now came on to be heard.

Mr. *Jessel*, Q.C., and Mr. *Locock Webb*, for the Plaintiffs :—

The Defendants have no right whatever to the pavement or roadway adjoining the warehouses; their only right, whatever it may be, is over the strip nine feet wide lying between the fence and the dock. The roadway over which they have a right is described as lying between the dock and the warehouses. Now the pavement is part of the curtilage of the warehouse, and would pass, under a grant of it, by the simple description of "warehouse": *Sparrow* v. *Oxford, Worcester, and Wolverhampton Railway Company* (1); *Grosvenor* v. *Hampstead Junction Railway Company* (2). Consequently the roadway in question is bounded by the fence, not by the wall of the warehouse. Even if the word "warehouses" in the lease is to be taken as meaning the actual warehouse, and not the fence, still the word "between" does not mean "between and up to": *Grantham Canal Company* v. *Ambergate, &c., Railway Company* (3); and therefore the roadway cannot be taken to include that portion which was fenced off, the words of the demise being satisfied if it extends only to the strip of nine feet adjoining the dock.

At all events, it is clear that the right of way is for foot-passengers only, and does not extend to horses and carriages.

Mr. *Southgate*, Q.C., and Mr. *Renshaw*, for *Rose* :—

We say that the fence did not exist at the date of the lease; but assuming that it did, to what roadway can the words of the lease be referred, except that lying between the fence and the warehouses? We have a right of way in common with the occupiers of the warehouse; that is, if the Plaintiff's theory be true, a right of way over something which is outside the premises of the Defendants.

Upon the construction of the deed, we say that the right extends to user with horses and carriages. It is a right to use a roadway;

(1) 2 D. M. & G. 94. (2) 1 De G. & J. 446.
(3) 21 L. J. (Q.B.) 322.

M. R. 1871 COUSENS v. ROSE.

we claim to use it in the ordinary way in which a roadway is used. When a right of way is granted by a deed, the grant is to be construed in the largest way possible. A grant of a way to a close is a grant of a way for all purposes for which the close can be used: *Henning* v. *Burnet* (1); *Williams* v. *James* (2). In *Watts* v. *Kelson* (3) it was held that a right of way to a wicket-gate meant a way for horses and carriages as well as a footway. [On this point they also referred to *Cowling* v. *Higginson* (4) and *Hawkins* v. *Carbines* (5).] The bill is multifarious: *Tasker* v. *Small* (6).

Sir *R. Baggallay*, Q.C., and Mr. *Lindley*, for *Scott* and *Large*.

Mr. *Jessel*, in reply:—

The objection as to multifariousness cannot be raised at the hearing: *Mole* v. *Smith* (7).

As to the nature of the right of way: this is a grant of a way to a particular class of persons, not of a general right of way to a place, and therefore is distinguishable from all the cases cited on the other side. Now a grant of a right of way to a person means a right of footway only, not a right of way with horses and carriages: *Jarman's Bythewood's* Conveyancing (8). You cannot extend the right beyond the terms of the grant: *Brunton* v. *Hall* (9). It is obvious here that this is what the parties meant. The object of giving the right of way was to enable the lessees to use the dock effectually; and in order properly to haul vessels into it for purposes of repair, it was necessary that the lessees' workmen should have plenty of room. With a right so limited the fence does not interfere.

April 19. LORD ROMILLY, M.R., delivered his judgment, of which the material portions are as follows:—

The suit, constituted in this manner, is obviously multifarious, and, like most suits so constituted, is in a most inconvenient and

(1) 8 Ex. 187.
(2) Law Rep. 2 C. P. 577.
(3) Ibid. 6 Ch. 166.
(4) 4 M. & W. 245.
(5) 27 L. J. (Ex.) 44.
(6) 3 My. & Cr. 63.
(7) Jac. 490, 494.
(8) Vol. iv. p. 242.
(9) 1 Q. B. 792.

irregular frame; but as objection has not been taken to it by way of demurrer, it is too late to do so now. I may, therefore, at once dispose of the case so far as the executors are concerned. They, on the whole, submit to act as the Court shall direct. They admit the contract, and though they raise some difficulties as to obtaining a license from the ground landlord to demise a portion of the property included in the contract made by *Winn* with the Plaintiffs, they do not resist specific performance. It is, I think, reasonably clear that they can obtain the consent of the ground landlord for a reasonable sum of money, or if they cannot, then the contract must be specifically performed, with a compensation for this omission. They do, however, suggest that the including of this piece of land in the contract was not intended; but that doing so was a blunder and a mistake on the part of *C. Winn*. Still, as regards them, the suit must be treated as an ordinary suit for specific performance, and if they intended to object they have not done what they might and ought to have done for that purpose, viz., have demurred to the bill for multifariousness; and on the whole they seem to me to give their evidence fairly and honestly, without favour to either side. The Plaintiffs cannot, therefore, complain of them or the course they have pursued. Before filing the bill, the Plaintiffs should have tendered to *Scott* and *Large* the lease of the *Gun Wharf*, according to the contract, subject to such rights as *Rose* might possess. If the Defendants had then declined to execute the lease, or had refused to attempt to obtain the consent of the ground landlord for the little piece of land included in the contract, or if they had declined to include in the lease the strip of land specified in the plan annexed to the contract, I might, on a bill being filed for specific performance against them, have compelled them to pay the costs of it. But not only was this not done, but no application was even made to them on the subject, and as the Plaintiffs had been for several years in occupation of the property demised, without asking for a lease, the Defendants might well suppose that they were content with the mere occupation under the agreement, and did not require the lease. Such being the case, I cannot, I think, refuse to give them their costs of this suit, assuming, as I do, that they will now take all the necessary steps for enabling them to give the Plain-

M. R. 1871 COUSENS v. ROSE.

tiffs a proper lease, according to the contract, or, if they cannot, allow compensation for such part as they cannot demise; and the decree as to them will simply be for specific performance, with a reference to Chambers to settle the lease in case the parties differ.

The case as to the Defendant *Rose* is very different, and is more complicated. The lease by *Winn* to *Rose* and *Crowder* unquestionably gives them a right of way over the strip of land in dispute. About this I entertain no doubt. I discard entirely the suggestion that the words in the lease to *Rose* and *Crowder* applied solely and exclusively to the nine foot remaining strip of the piece of land in question by the side of the dock. I am clear that the right granted extended to the whole strip of twenty-three feet broad. Nor do I doubt that the Plaintiffs had due notice of this right of way when they took the agreement for a lease. The next question is, what was the character of the right of way so granted, and what privileges did it confer on *Rose* and *Crowder?*

[His Lordship, after referring to the conduct of the parties in the interval between January, 1860, and the filing of the bill, and reading the words of the lease as set out above, continued:—]

The first thing that strikes me on reading these words is, that whatever be the construction on the question whether the right of way extends to horses and carriages, or whether it is confined to foot-passengers, nothing can justify the conduct of the Defendant *Rose* in pulling down the fence. The fence is admitted to be constructed on land not included in the demise to *Rose* and *Crowder*, and it is obvious that the common law right to build a wall or fence on his own land, which belonged to *Winn*, was in no respect abrogated or controlled by anything contained in this demise, and it is clear that this right is conferred on the Plaintiffs.

It is also clear that the repeated trespasses of *Rose* could not create such a right or vest it in him, even if they had been unaccompanied by the repeated remonstrances of *Winn*. Still less could it justify the deposit of obstructions on the roadway, for however short a time. In the matter originally complained of, therefore, by the Plaintiffs, viz., the pulling down the fence and the deposit of earth, I am clear that the Defendant *Rose* was in the wrong. I am also of opinion that this grant is not that of a general undefined right of way such as existed in the cases referred

M. R.
1871
COUSENS
v.
ROSE.

to by Mr. *Southgate*, but that it is a right of way granted for foot-passengers only and confined to them; that is, a right of way including the Defendant *Rose*, including his workmen, and also including any person or persons he may think fit to authorize; and all these persons are to be able to pass in, by, and through this passage, or fourteen foot roadway, but no one else and nothing more.

[His Lordship added that it was clear, from certain correspondence which had taken place between *Winn* and *Rose*, that such a right of way was in accordance with the intention of the parties; that the suit had been occasioned by the misconduct or mistake of the Defendant *Rose*, and that he must pay the costs other than those of *Scott* and *Large*, which would be paid by the Plaintiffs. The decree would contain a declaration that, subject to a right of way and passage, and of ingress, egress, and regress for the Defendant *Rose*, following the terms of the lease of the 7th of March, 1860, the Plaintiffs were entitled to the sole and exclusive right of way over the roadway in the pleadings mentioned for the residue of the term of twenty-one years therein mentioned.]

Solicitors: Mr. *H. Wellington Vallance;* Mr. *W. Carpenter;* Mr. *W. H. Haycock.*

SUTTON *v.* WILDERS.

M. R.
1871
July 3, 12.

Trustee—Loss of Trust Fund—Investment on Mortgage—Fraud of Solicitor—Liability of Trustee.

Semble, a trustee is liable for the loss of a trust fund caused by his solicitor having committed a fraud on the occasion of the investment of the fund on mortgage.

Upon the occasion of the investment of a trust fund on mortgage, the trustee employed the same solicitor as the mortgagor. Subsequently he had reason to suspect the sufficiency of the security, but took no steps to inquire into the matter. It afterwards turned out that the solicitor had practised a fraud on the trustee, and that the security was insufficient:—

Held, that the trustee was liable for the loss occasioned to the trust estate.

22 LD. 732

IN November, 1833, *James Sutton* and *James Clifford* became the trustees of the settlement made on the marriage of Mr. and

M. R. 1871 SUTTON v. WILDERS.

Mrs. *Wilders*. Part of the trust property consisted of a sum of £5500. In December, 1842, the trustees applied to *William Eaton Mousley*, of *Derby*, solicitor, to find them a proper security on which this sum might be invested. *Mousley* represented to the trustees that one *William Eaton*, of *Hoon* (who was a relative and client of his), wished to raise money on an unexceptionable security, and would pay interest at the rate of £4 5*s*. per annum. The trust fund was accordingly advanced to *William Eaton* on the security of an indenture dated the 20th of December, 1842, whereby he purported to convey certain hereditaments to the trustees in fee by way of mortgage. *Mousley* was the only solicitor employed in the transaction.

The interest was regularly paid by *William Eaton* or *Mousley* down to June, 1852; and *Mousley* latterly represented that he had become the owner of the equity of redemption.

In 1853 *Mousley* died. Throughout his life he had been in good repute as a solicitor; but on his death it proved that he was insolvent, and had by fraudulent transactions ruined many persons.

In particular it was discovered that the hereditaments comprised in the mortgage of the 20th of December, 1842, were subject to a settlement dated the 31st of March, 1834, under which *William Eaton* took only a life interest in the property, together with a power of raising thereout the sum of £2500 for his own benefit. The deed had been altered after execution by turning £2500 into £5500.

James Clifford died in August, 1866; and a suit of *Cullen* v. *Cullen* had been instituted in this Court for the administration of his estate.

James Sutton died in January, 1868; and the Plaintiffs were his legal personal representatives.

William Eaton died in January, 1869. The trust estate was found at his death to have suffered considerable loss by reason of the insufficiency of the security of the 20th of December, 1842; and in March, 1870, the bill in this suit was filed against the *cestuis que trust* under the marriage settlement of Mr. and Mrs. *Wilders* and the legal personal representatives of *James Clifford*, praying that the trusts of the settlement might be administered under the direction of the Court, and that proper directions might

be given for ascertaining the rights and liabilities of all parties with respect to the sum of £5500, that new trustees might be appointed, and that, so far as might be necessary, the Plaintiffs might be at liberty to apply in the suit of *Cullen* v. *Cullen* to stay the distribution of the estate of *James Clifford* until the liability of his estate in respect of the sum of £5500 should be ascertained.

The suit now came on to be heard. A letter from *James Sutton* to Mr. *Wilders*, dated the 4th of February, 1843, was put in evidence, the material portion of which was as follows:—

"Mortgage on an estate at *Hoon*, which is valued by *Francis Sandars*, say—

"158A. 2R. 31P. £397 7*s*. 10*d*. £12,716 10*s*.

"Interest on £5500 at 4¼ per cent.

"Mortgage on an estate at *Windley*, value by *Francis Sandars*—

"76A. 2R. 9P. £35 10*s*. £8365

"Interest on £4500 at 4¼ per cent.

"I wrote to you a few days ago to say I had received a box of deeds from Mr. *Mousley*. I have run my eye over them and find they contain mortgages as above. There are some charges of ladies' annuities on the *Hoon* property, which, if not released, will make the security doubtful; indeed, *Sandars'* valuation is out of all character. However, I shall send the deeds to be looked over by my attorney, who will, no doubt, report upon the title. The original deeds are with the mortgage, so that if the title is good it will be all well. But if there is three £50 [sic] charged on *Hoon*, as there appears to be, it is a question if it is a security for £5500.

"*Mousley* has not performed his promise, I understood he had made you, of 4½ per cent., but perhaps he may pay that rate to you so long as in his hands."

It did not appear that either of the trustees took any steps with reference to the security until after the death of *Mousley*.

Mr. *Jessel*, Q.C., and Mr. *Currey*, for the Plaintiffs:—

The liability of the Plaintiffs will probably be rested on two grounds: first, that they ought to have employed a separate solicitor on the occasion of the investment; secondly, that they are liable for the fraud of their solicitor.

As regards the first point, there is no rule that trustees must

M. R. 1871 SUTTON v. WILDERS.

not, upon investing trust money upon mortgage, employ the mortgagor's solicitor. Indeed, to enforce such a rule would put a stop to the transaction of business by country solicitors, who are constantly employed by one set of clients to find investments for them, and by another set to procure loans for them.

As regards the second point, the rule of the Court is laid down accurately in *Lewin* on Trusts (1): "A trustee is called upon to exert precisely the same care and solicitude on behalf of his *cestui que trust* as he would do for himself; but greater measure than this a Court of Equity does not exact:" *Jones* v. *Lewis* (2); *Johnson* v. *Newton* (3). Here the trustees employed a solicitor who was of the highest standing; he committed a fraud on them; that was not an act within the scope of his authority, and the trustees cannot be liable. It is quite a different case when the question is simply one of negligence: there the trustees may be liable. Here they took all the precautions which a person would ordinarily take in dealing with his own property, and they ought not to be held liable.

The only case which seems to be adverse to us is *Bostock* v. *Floyer* (4). The trustee there handed the money to his solicitor; the solicitor misapplied it; but, nevertheless, the trustee must be liable, for he could not shew a good discharge for it.

As regards the representatives of *Clifford*, they have been properly made parties to the suit: *Birks* v. *Micklethwait* (5).

Mr. *Southgate*, Q.C., and Mr. *Speed*, for the representatives of *Clifford*, were not called upon.

Sir *R. Baggallay*, Q.C., and Mr. *W. R. Fisher*, for the *cestuis que trust*:—

The case is governed by *Bostock* v. *Floyer* and *Hopgood* v. *Parkin* (6). It is admitted that the trustees would have been liable, if the solicitors had been guilty of negligence simply; how can they be exonerated if he has committed a fraud on them in addition?

(1) 5th Ed. p. 241.
(2) 2 Ves. Sen. 240.
(3) 11 Hare, 160. 17 Jur 826
(4) Law Rep. 1 Eq. 26. 35 Beav 6
(5) 34 L. J. (Ch.) 362. 10 Jur NS
(6) Law Rep. 11 Eq. 74.
(4) & c 11 Jur NS. 96.

July 12. LORD ROMILLY, M.R. :— M. R.

1871

SUTTON v. WILDERS.

The question to be decided in this case is, whether a trustee now deceased, of the name of *James Sutton*, was guilty of a breach of trust in lending trust property on an insufficient security, which he was induced to do by reason of the fraudulent conduct of his solicitor:—[His Lordship then stated the facts]. The question is, what relief can be given against either trustee. First, as against the representatives of *Clifford*, it appears that on the 8th of December, 1869, a bill was filed for the administration of the estate of *Clifford* against his representative, and that the suit is still subsisting in another branch of this Court. Therefore, assuming the Plaintiff to have a right to establish a debt against his estate, it ought to be done by proof in that suit, and the representatives of *Clifford* were not necessary or proper parties to this suit. Then, as regards the estate of *Sutton*, the present bill is filed to raise the question; and upon considering it as if both the trustees were now living, I have come to the conclusion that they are liable for the misconduct of their solicitor *Mousley*. He was their agent for lending the money on proper security, and he failed to perform his duty. The Court makes exception in the case of a banker who fails when the trust money is only allowed to remain in his hands for a reasonable time, because the money must be kept by the trustees somewhere till it is invested or distributed; and no place is so secure as a bank in good repute. But if a trustee intrusts the money to a servant who robs him, the trustee is liable. If he employs a solicitor who neglects his duty, the principal is liable. Here it is even more so, because the trustees did not examine anything or require any opinion on the title, or the like, but trusted implicitly to *Mousley*, who defrauded them.

It appears, also, from a letter of *Sutton* to Mr. *Wilders*, that he suspected *Mousley*, but did not take proper precautions in consequence of such suspicion. Either *Mousley* was or was not his solicitor. If he was not, he did not take proper precaution by applying to his own solicitor; and if he was, then he employed the solicitor of mortgagors, which, though not in itself culpable, requires the trustee who does so to take additional precautions. If it be said that the loss was caused by forgery, and that no

M. R. 1871 SUTTON v. WILDERS.

precaution would have prevented it, then I have held that when a forgery is committed upon any person the loss must fall on him, whether he be the principal or trustee; and this view of mine has, I believe, been affirmed by the House of Lords in the case of a forgery upon one of the railway companies: *Midland Railway Company* v. *Taylor* (1).

Solicitors: Messrs. *R. & W. B. Smith;* Messrs. *Taylor, Hoare, & Taylor;* Messrs. *White & Sons.*

M. R. 1871 July 17.

PEEK *v.* LARSEN.

Ship—Charterparty—Lien for Dead Freight—Advertisement of Vessel as General Ship—Notice.

9 QB. 448
52 LJ. 119, 120
128

Where a vessel about to sail is advertised as a general ship, an intending shipper is not bound to inquire as to the existence of any charterparty.

A person who, without notice of any charterparty, has placed goods on board a vessel which has been advertised as a general ship, is entitled to have his goods returned to him if the captain refuses to sign bills of lading except subject to a charterparty containing objectionable provisions.

A Norwegian vessel was advertised as a general ship by Messrs. *C. & Co.*, an English firm, described in the advertisement as brokers. The Plaintiffs entered into an agreement with Messrs. *C. & Co.* for the carriage of certain goods at a stipulated rate of freight, and placed the goods on board before they had notice of any charterparty affecting the ship. It afterwards proved that Messrs. *C. & Co.* were charterers of the vessel under a charterparty, which provided that the owner should have a lien for freight, dead freight, and demurrage. The captain refused to sign bills of lading, except subject to the charterparty, or to return the goods to the Plaintiffs:—

Held, that the owners of the ship were not entitled to retain the goods in satisfaction of their claims under the charterparty, and that the Plaintiffs were entitled to have the goods delivered to them free from any claim by the owners.

THE Plaintiffs in this suit were a firm of tea merchants carrying on business in *London* under the firm of *Francis Peek, Winch, & Co.* The Defendants were *Niels Larsen*, the master, and *Henrick Boldman Bjorn*, the owner, of the Norwegian ship *Alliance.*

In February, 1870, the *Alliance* was advertised as about to sail

(1) 8 H. L. C. 751. 8 Jur. N. S. 419.

from *London* for *St. John, New Brunswick.* The material part of the advertisement was as follows: "Guaranteed first spring ship, to sail March 1st, 1870, direct for *St. John, N.B.*, the splendid and fast clipper *Alliance,* five sixths in veritas and coppered, 800 tons, *Niels Larsen* commander, loading in the *London Docks.* For freight or passage, apply to *J. D. Claxton & Co.*, brokers, 5½, *Lawrence Lane, Cheapside.* To be followed by other well-known clippers."

On or about the 25th of February, 1870, the Plaintiffs made a bargain with Messrs. *J. D. Claxton & Co.* for the carriage of 149 packages of tea from *London* to *St. John* by the *Alliance,* at the rate of 17*s.* 6*d.* per ton and 5 per cent. freight, payable at *St. John,* with an allowance for primage. The sum payable by the Plaintiffs under this bargain was 10*l.* 16*s.* 8*d.*, less 10*s.* 11*d.* allowed for primage.

On the 1st of March the packages in question were by direction of the Plaintiffs taken from the *London Dock* and placed on board the *Alliance;* and a receipt for the goods, signed by the mate, was given to the dock company. On the same day the Plaintiffs presented to Messrs. *J. D. Claxton & Co.* bills of lading for signature by the captain. On the 7th of March, Messrs. *Claxton* returned the bills unsigned, and by an accompanying letter stated that they had been obliged to remove the vessel from the berth, and referred the Plaintiffs to Messrs. *Dahll & Co.*, 16, *Water Lane,* for the removal of the goods from the ship. Upon applying to Messrs. *Dahll,* the Plaintiffs were informed that Messrs. *Claxton* were the charterers of the ship, and that in consequence of their being unable to carry out the terms of the charterparty, the captain meant to hold the Plaintiffs' tea for expenses incurred through waiting for freight and otherwise.

Up to this time the Plaintiffs had no knowledge or notice of the existence of any charterparty affecting the vessel. Upon further inquiry being made, it appeared that the *Alliance* was chartered to Messrs. *J. D. Claxton & Co.* by a charterparty dated the 27th of January, 1870, of which the material clauses were as follows:—

"It is this day mutually agreed between Captain *Larsen* for self and owner of the good ship or vessel called the *Alliance,* 5/6 2 1 and T. M., self master, of the measurement of 363 tons or thereabouts, now in *London,* and Messrs. *J. D. Claxton & Co.* of *London,*

M. R. 1871 PEEK v. LARSEN.

charterers, that the said ship being tight, staunch, and strong, and everyway fitted for the voyage, shall and will with all convenient speed sail and proceed to a safe loading-place in the *London Docks*, or so near thereto as she may safely get, and there load afloat from the factors of the said charterers a full and complete cargo of lawful merchandize, lucifer matches included, acids, and gunpowder not to exceed five tons, and shall be carried on deck at shippers' risk, scrap iron to be excluded, and not exceeding seventy-five tons of railway or bar iron. Gunpowder to go below. The cargo to be brought to and taken from alongside the ship at merchants' risk and expense, which the said freighters bind themselves to ship not exceeding what she can reasonably stow away over and above her tackle, apparel, provisions, and furniture, such room only as the owners would reserve were the owners loading the ship for their own benefit, and being so loaded shall therewith proceed to *St. John's, New Brunswick*, or so near thereto as she may safely get, and deliver the same, always afloat, on being paid freight as follows:—Thirty shillings British sterling per British register ton, five guineas gratuity in full of all port charges and pilotage as customary. . . The freight to become due and paid in cash on unloading and right delivery of the cargo. The charterer's responsibility to cease as soon as the cargo is on board, except such difference as may exist between the freight payable by bills of lading at *St. John* and the freight due to the vessel in virtue of this agreement, such difference to be paid the captain in cash on signing bills of lading. The captain to have an absolute lien on the cargo for freight, dead freight, and demurrage."

Subsequently to the 7th of March, 1870, the Plaintiffs tendered bills of lading to the captain of the ship for signature, but he refused to sign them except subject to the charterparty; and he also refused to deliver up the tea, claiming to be entitled to hold and sell it in order to satisfy the claims of the Defendants against Messrs. *J. D. Claxton & Co.* under the charterparty. In consequence of such refusal, the bill in this suit was filed to restrain the Defendants from sailing with the packages of tea, or removing the same from the *London Dock*, or selling or disposing of the same.

Under an order made in the suit the tea was removed from the ship and placed in bond in the *London Docks*, in the joint names of

the solicitors to the parties, to abide the order of the Court. After this order was made the bill was amended, and as amended contained a prayer for a declaration that the Plaintiffs were entitled to the tea free from any claim or demand on the part of the Defendants or either of them; for an order directing the Defendants to concur in the transfer of the tea into the Plaintiffs' names in the *London Docks*, for the purpose of being dealt with as the Plaintiffs might think fit, the intended carriage thereof having failed; and for damages.

The cause now came on to be heard.

Sir *R. Baggallay*, Q.C., and Mr. *Marten*, for the Plaintiffs:—

The Defendants claim to have a lien on the tea for dead freight, as stipulated for by the charterparty; but we never heard of the charterparty until long after the goods were placed on board; and we have always refused to accept bills of lading containing any reference to the charterparty. Even under the charterparty there is no pretence for the claim; the goods were not carried by the Defendants, and until the voyage is completed the right to freight does not arise. Moreover, the charterparty authorizes the captain to sell bills of lading at a lower rate of freight than that reserved to the owners of the vessel.

In all cases where the shipper has been held liable to such a demand as this, he has accepted bills of lading subject to the charterparty; and unless the shipper accepts bills of lading in that form, there can be no right to enforce the lien against him: *Paul* v. *Birch* (1); *Mitchell* v. *Scaife* (2); *Howard* v. *Tucker* (3); *Foster* v. *Colby* (4); *Shand* v. *Sanderson* (5); *Fry* v. *Chartered Bank of India* (6).

The terms of the charterparty are not sufficiently clear to entitle the Defendants to the lien they claim: *Sandeman* v. *Scurr* (7).

The ship was advertised as a general ship, and the shipper was under no obligation to inquire as to the existence of any charterparty; nor, in the absence of fraud, is he bound by the terms of the charterparty, if any exists.

(1) 2 Atk. 621.
(2) 4 Camp. 298.
(3) 1 B. & Ad. 712.
(4) 3 H. & N. 705; 28 L. J. (Ex.) 81.
(5) 4 H. & N. 381; 28 L. J. (Ex.) 278.
(6) Law Rep. 1 C. P. 689.
(7) Ibid. 2 Q. B. 86.

M. R. 1871 PEEK v. LARSEN.

The goods were placed on board by mistake, under the belief that a proper agreement could be entered into for the carriage thereof upon the terms arranged between the Plaintiffs and Messrs. *Claxton*. That cannot be done, and the goods should be returned.

Mr. *Southgate*, Q.C., Mr. *J. C. Mathew*, and Mr. *F. H. Colt*, for the Defendants:—

The Plaintiffs put goods on board a Norwegian vessel; they enter into a contract with Englishmen for the carriage of them; it was therefore the duty of the Plaintiffs to inquire how the Englishmen came to be authorized to enter into such a contract: *Kern* v. *Deslandes* (1); *Blaikie* v. *Stembridge* (2). If they had done so, they would have become aware of the charterparty.

The charterparty confers a valid lien for dead freight on all goods shipped: *McLean* v. *Fleming* (3); *Gladstone* v. *Birley* (4); *Campion* v. *Colvin* (5).

The lien arises in whatever way advantage is taken of the charterparty: *Small* v. *Moates* (6).

There are three classes of charterparties. In the first class the charterparty takes the form of a lease, and the owner goes out altogether. *Paul* v. *Birch* (7) was a case of that class, and has nothing to do with the present case.

The present charterparty is a typical instance of the second class. It is largely made use of in the case of foreign vessels, or where the owner is not satisfied as to the position of the charterer. The owner looks to his lien; the captain has no authority to sign bills of lading except on the terms of the charterparty; and, *à fortiori*, the charterer has none.

The third class of charterparties is made use of where the vessel is intended to be set up as a general ship; then the captain is empowered to enter into contracts with shippers at any rates. That is not the case here; the captain had no such authority in this case: and it will be a severe blow to commerce if the charterers can deprive the owner of the benefit of this bargain.

(1) 10 C. B. (N.S.) 205.
(2) 6 Ibid. 894.
(3) Law Rep. 2 H. L., Sc. 128.
(4) 2 Mer 401.
(5) 3 Bing. N. C. 17.
(6) 9 Bing. 574.
(7) 2 Atk. 621.

The Plaintiffs had no right to call upon the captain to return the goods when they discovered the existence of the charterparty. The goods might have been at the bottom of the hold, in which case it would have been necessary to unload the whole cargo in order to get at them, and thus great delay would have been occasioned, for the consequences of which the captain would have been responsible to other shippers.

LORD ROMILLY, M.R.:—

I am of opinion that this is a very clear case. I think that it depends upon this: Had the Plaintiffs, the shippers, notice of this charterparty, or was it their bounden duty to inquire whether there was a charterparty or not?

I fully admit that every person is bound by the contents of a charterparty of which he has notice. If he does not choose to inquire what the contents of the charterparty are, that is his own fault, and he must take the consequences of it. But I am of opinion that, until he is either set upon inquiry or has notice of a charterparty, he is not bound to assume that there is a charterparty. All that the Plaintiffs knew in this case was the advertisement. That advertisement was inserted in the paper in consequence of the charterparty entered into between the owner and Messrs. *Claxton;* but any one reading it would suppose that Messrs. *Claxton* were the agents of the owner of the ship.

Then it is said that it would be exceedingly hard if a person, by sending goods on board, might put an end to a contract between the charterer and the owner of the ship. He can do nothing of the sort. I fully assent to the argument that the master of the ship could not enter into any fresh contract with the shipper. But he is bound to do this—and that constitutes the contract—he is bound to sign a bill of lading when he receives the goods on board. And, accordingly, these shippers, when they shipped their goods and got a receipt for them, sent to Messrs. *Claxton & Co.* the bills of lading to be signed by the master. The bills of lading were returned unsigned by the master, and they were informed that the ship would not sail.

But if the master on board the ship had signed the bills of lading, and had said, "As per charterparty," that moment the

M. R. 1871 PEEK v. LARSEN.

shipper would have said, "I did not intend to send any goods on board subject to a charterparty. I will suspend sending the goods on board to see what the charterparty is." If he had signed the bill of lading without any reference to any charterparty at all, then, whether it bound the owner or not, it is quite clear that the master would have entered into a contract to take the goods at the rate of freight which Messrs. *Claxton & Co.* had stated, without reference to and without notice of any charterparty at all. How is a person to get such notice except from the master on board the ship? It is the duty of the master to give notice of it in signing the bill of lading. I inquired if there was any authority for saying that it was not the duty of the master to sign the bill of lading. I myself never heard of a master taking goods and then not signing the bill of lading.

Then this case was put. It was said, "You may have waited until the ship is fully laden; and the goods may be at the bottom of the hold." That is possible; and of course, if the shipper has been guilty of laches, that forms a new feature in the case. If there be any laches, the shipper cannot complain of absence of notice, in consequence of his applying so late for the bill of lading. In this case, however, the master acted very properly, and in accordance with his authority. He said: "I will sign the bill of lading willingly, but it must be according to the charterparty." Thereupon the shippers, finding what the charterparty was, said: "We do not choose to enter into this contract." Then how can you compel them to enter into a contract to send their goods on board according to a charterparty by which, the moment they hear of it, they say, "We do not choose to be bound?"

I waited to see if there were any authorities that met that view, and I think the nearest case on the subject was that which Mr. *Southgate* brought to my attention, of *Small* v. *Moates* (1); but I think the propositions there laid down shew clearly that the Judges there would not have so held in the present case. That was nothing more than this. The master on board the ship had goods which belonged to the owner; that is to say, the owner had a lien upon them; and the master chose to sell those goods, and to treat them as if there was no lien upon them at all. Then the Court

(1) 9 Bing. 574.

had to consider between two innocent parties which was to suffer—whether the man who sold the goods as his own gave a good title to them, or whether, in point of fact, he could only sell what he himself possessed, which was subject to the lien in favour of the owner of the vessel? That does not touch this question, and accordingly, in giving judgment in that case, the learned Judge says (1), "that a shipper putting his goods on board the ship as a general ship"—and that is strictly this case, for there is everything in the advertisement to shew that it was a general ship—"upon the faith of a bill of lading signed by a person whom the owner has allowed to bear the character of master, would be entitled to receive the goods at the end of the voyage upon payment of the freight reserved by the bill of lading, may be readily admitted, as well upon the reasonableness of the proposition itself as upon the authority of the decided cases referred to by the Plaintiffs in the course of the argument." That merely shews this, that if the master had signed a bill of lading for these goods *simpliciter*, without any notice of the charterparty, the shippers would have been entitled to receive the goods at the end of the voyage upon the ordinary payment of freight.

But he very wisely did not do that, but said: "I will sign it according to the charterparty." But is that to bind the shipper who hears of this charter for the first time, and says that he will not be bound by it? Why is he not to be allowed to have back his goods? He has entered into no contract. This would be to bind him by a contract which not only he has never entered into, but which he has refused to enter into, and which is of a very onerous character, to be carried out by the owner and charterer, and of which he has had no previous information.

I am of opinion that such a proceeding would not be according to equity. That is not the doctrine of notice in Courts of Equity. We hold that a man is bound by notice whenever he has either distinct notice, or such information as sets him upon inquiry; and accordingly, in the very case I have referred to, one of the persons was treated as being set upon inquiry. But there is nothing here to set him on inquiry; but, on the contrary, it appears that the advertisement was simply an advertisement for a general ship, with

(1) 9 Bing. 591.

M. R. 1871 PEEK v. LARSEN.

nothing to suggest such a thing as a charter. Therefore I am of opinion that the Plaintiffs are not bound by anything, and that not having received any bill of lading, and no transaction being completed between the parties, I cannot compel them to be bound by a charterparty of which they knew nothing, and of which they had no information. I think, therefore, they are entitled to a decree.

Solicitors: Mr. *H. G. Stokes;* Messrs. *Plews & Irvine.*

M. R. 1871 *July* 18.

HARDY *v.* METROPOLITAN LAND AND FINANCE COMPANY.

Breach of Trust by Directors—Suit to recover Moneys improperly received and applied—Directors not made Parties to Suit.

The manager of a benefit building society, established pursuant to 6 & 7 Will. 4, c. 32, deposited, with the knowledge of the directors, but contrary to the provisions of the Act, part of the society's money with a finance company of which he was also manager. The company gave a cheque to the said manager for the repayment of the money to the building society, but he did not pay over the money to the society, and afterwards died. The trustees of the building society thereupon, with the sanction of the directors, filed a bill against the finance company to recover payment of the money, but the directors were not made parties to the suit:—

Held, that the suit could not be sustained, and that the remedy, if any, was at law.

Revd by L.J. 16 Ch 427

THIS was a suit by the trustees of the *London Benefit Building Society* to recover from the defendant company a sum of £375, alleged to have been improperly received.

The said building society was established pursuant to the provisions of the Act 6 & 7 Will. 4, c. 32, with which was incorporated the Act 10 Geo. 4, c. 56, and the rules were duly certified.

The defendant company was incorporated, among other purposes, for the raising and borrowing of money at interest and receiving deposits.

The late manager of the building society, *Joseph Dutton*, who was also the manager of the defendant company, was permitted by

the directors of the building society to deposit part of the society's moneys with the defendant company. These deposits were made from time to time between 1866 and 1869, when a balance of £375 was standing to the credit of the building society in the books of the defendant company. The defendant company then drew a cheque for the amount, and handed it to *Dutton* on behalf of the building society, but it was never paid over to the trustees or directors. *Dutton* shortly afterwards died.

The present suit was instituted by the trustees of the building society pursuant to a resolution of the directors, and the bill alleged that the deposit of the society's moneys with the defendant company was unauthorized and illegal, as they had no power to lend money otherwise than on real and heritable securities, and that in fact the society and its officers were prohibited by the said Acts of Parliament, and by their rules, from so doing; that the defendant company had notice of such illegality; that the repayment to *Dutton* was made without any authority from the directors of the building society, and without taking any proper receipt; and that the defendant company were liable to repay the amount. It prayed a decree accordingly.

The defendant company, by their answer, submitted that they had no notice through *Dutton* or otherwise that the building society had no power or authority so to invest the moneys of the society, and that if that were so, it followed that the society had also full notice of the fact of such investment, as some of the directors of the defendant company were at the same time directors of the building society. They alleged that they had duly repaid the said sum of £375 to the building society by a cheque given to *Dutton*, the manager of the society. They further submitted that the relief sought by the bill was in the nature of a mere money demand, and might be properly dealt with by a Court of Law.

Mr. *Davey* (Mr. *Southgate*, Q.C., with him), for the Plaintiffs:—

The deposit of the money was a breach of trust, and was contrary to the Act of Parliament, so that the defendant company had constructive notice at the time when they received the money. The money having come into their hands tainted with the breach of trust of which they had notice, they became bound to repay it,

M. R. 1871 HARDY v. METROPOLITAN LAND AND FINANCE CO.

and they repaid it not to the trustees, but to *Dutton*, the manager, who had no right to receive it at all, so that they really repaid it to him as manager of their own company.

The Plaintiffs are entitled to sue in equity, as in *Gray* v. *Lewis* (1), and to proceed against those who received the money with knowledge of the breach of trust: *Ernest* v. *Croysdill* (2). The directors are not necessary parties to the suit.

Mr. *Cookson*, for the company, was not called on.

LORD ROMILLY, M.R.:—

I am of opinion that this suit fails. It is brought nominally by the trustees of the *London Benefit Building Society*, but really by the directors, to make the defendant company repay the sum of £375 lent to them by the directors of the building society.

This suit either rests upon a breach of trust, or it does not. If it rests on the ground of a breach of trust on the part of the directors in lending the money to a finance company, then the directors were as guilty in lending the money as the company was in receiving it.

Mr. *Davey* argued, that it being a breach of trust to advance the money, the defendant company, by dealing with the building society, must be taken to have known of the breach of trust, and are therefore liable to repay the money. If that were so, then I am of opinion that it would be impossible for the directors of the building society to proceed against those to whom they themselves advanced the money, and make them liable to repay it to the trustees, who are only formal parties to the suit.

The case of *Gray* v. *Lewis* does not apply at all. If such a suit is instituted alleging a breach of trust, it must be brought by some parties complaining of the directors and of the defendant company, and seeking to make both liable. But the prayer of the bill in the present suit is not framed on the ground of a breach of trust; and that being so, it is reduced to a mere money demand, and the question then is, whether the money has or has not been actually repaid; but that I do not go into. There is no foundation

(1) Law Rep. 8 Eq. 526. (2) 2 D. F. & J. 175, 196.

for the proceedings in equity, and the bill must be dismissed with costs, without prejudice to any proceedings at law.

M. R. 1871 HARDY v. METROPOLITAN LAND AND FINANCE CO.

Solicitors for the Plaintiffs: Messrs. *Willoughby & Cox.*
Solicitors for the Company: Messrs. *Sharp & Turner.*

In re MARYLEBONE (STINGO LANE) IMPROVEMENT ACT. *Ex parte* EDWARDS.

M. R. 1871 *July* 8, 15, 22.

Public Company—Notice to Treat—Compensation—Interest created after Notice to Treat—Lands Clauses Act, 1845.

An interest in property created by an agreement entered into by the owner after a notice to treat has been served on him, is not a subject for compensation under the *Lands Clauses Act*, 1845.

Where, therefore, the owner of property after a notice to treat had been served on him entered into an agreement with a person who had for several years occupied part of the property as weekly tenant for a lease of the same to him for a term of three years:—

Held, that the tenant was not entitled to compensation in respect of the interest created by such agreement.

BY the *Marylebone* (*Stingo Lane*) *Improvement Act*, 1868, with which the Lands Clauses Consolidation Acts, 1845 and 1860, were incorporated, the Metropolitan Board of Works were authorized to take for the purposes of the Act certain property, including a house, No. 6, *Stingo Lane*, of which *Henry Topple* was lessee for a term of years.

In May, 1869, the board served on *Henry Topple* the usual notice to treat for the purchase of his interest in the property.

For several years previously to the giving of such notice *William Edwards* had occupied part of the said house as weekly tenant to *Henry Topple* at a rent of 12*s.* a week, and had carried on the business of a barber and hair-dresser there. *Topple* had, as was alleged, made repeated verbal promises to *Edwards* to grant him a lease of the premises occupied by him; and in January, 1870, a written agreement (which was made to bear date the 18th of December, 1869) was entered into between them, whereby *Topple* agreed to

M. R. 1871

In re Marylebone (Stingo Lane) Improvement Act. *Ex parte* Edwards.

let, and *Edwards* to take, such premises at the weekly rent of 12*s.* for the term of three years, from the 18th of December, 1869.

On the 24th of February, 1870, *Topple* sent to the board the particulars of his interest in the property, and of his claim for compensation. It was stated therein that the part occupied by *Edwards* was let to him on a three years' agreement at a rent after the rate of £31 4*s.* per annum. The claim was referred to arbitration, and the compensation payable to *Topple* was assessed at £1381. The agreement between *Topple* and *Edwards* was produced before the arbitrator, and it was admitted by *Topple* that it was entered into subsequently to the notice to treat being served on him.

In March, 1871, *Edwards* sent to the board a claim for £350 in respect of his interest in the property, and for compensation for removal, goodwill of his business, &c. On the 27th of March, 1871, the board issued their warrant to the sheriff of *Middlesex* requiring him to summon a jury to assess the amount of compensation payable to *Edwards* in case the board should be held liable to make him any compensation; this warrant was expressed to be issued without prejudice to the right of the board to dispute such liability. In April, 1871, an inquisition was held by the sheriff pursuant to the warrant, and the compensation was assessed at £100.

In May, 1871, the board paid the sum of £100 into Court to an account entitled "*Ex parte the Metropolitan Board of Works.* The Account of *William Edwards* of 6, *Stingo Lane, Marylebone,* in the county of *Middlesex*, as tenant of a moiety of premises at 6, *Stingo Lane, Marylebone.*" On the 5th of June, 1871, the seal of the board was affixed to a deed-poll whereby, after reciting fully the circumstances under which the said sum was paid into Court, it was witnessed that the board, in pursuance of the power for that purpose given by the 77th section of the *Lands Clauses Consolidation Act,* 1845, did declare that the lands and hereditaments in respect whereof the deposit of the said sum of £100 had been made were the premises comprised in the thereinbefore recited agreement of the 18th of December, 1869, and that such deposit had been made under the circumstances thereinbefore appearing, by reason of the said *William Edwards* having failed to make out a title to such premises to the satisfaction of the board.

Edwards now presented a petition for the payment to him of the

£100 paid into Court, and also of his costs pursuant to the 80th section of the *Lands Clauses Consolidation Act*, 1845.

Mr. *Jessel*, Q.C., and Mr. *Willis-Bund*, for the Petitioner, contended that a notice to treat did not deprive the owner of property of his right to deal as he pleased therewith, and referred to *Carter* v. *Great Eastern Railway Company* (1).

Mr. *Southgate*, Q.C., and Mr. *Charles Hall*, for the Board of Works, contended that the notice to treat put an end to the owner's power to deal with the property; and that in this case the agreement was obviously entered into merely with the view of obtaining compensation, and was a fraud on the board. They referred to sects. 120 and 121 of the *Lands Clauses Consolidation Act*, 1845, as providing for the compensation payable to the Petitioner.

July 22. LORD ROMILLY, M.R. :—

I am of opinion that the owner's power of dealing with his property is concluded when the notice to treat is served, and that a lease granted subsequently to that period to a tenant cannot properly be compensated for. That is the only conclusion which I can come to. I still retain the opinion which I expressed at the hearing, that it is very hard that a person who has been tenant from year to year (in this case the Petitioner was a weekly tenant) for a great length of time, and is disturbed in his occupation by a railway company, or the like, only gets one year's value. I have had a great number of instances before me in Court, and personally, of persons who have been tenants of property from year to year, and their grandfathers before them, they holding at the present time the same property which their grandfathers formerly did, and I think that a much more liberal compensation ought to be given in those cases; but, at the same time, if after they had notice that the railway or public work was to take their land they attempt to provide against it by getting a lease, I think the company cannot be affected by it. After the notice to treat the thing is at an end, and they cannot alter it afterwards. Therefore I think that in this

(1) 8 L. T. (N.S.) 197.

M. R. 1871 *In re* Marylebone (Stingo Lane) Improvement Act. *Ex parte* Edwards.

case the Petition must be dismissed, but without costs. The result is, that Mr. *Edwards* must go before a magistrate to obtain his compensation, and I think that the board ought to deal with him liberally.

Solicitors: Mr. *Silberberg*: Mr. *W. W. Smith.*

M. R. 1871 *July* 22, 27.

In re OSBORN'S MORTGAGE TRUSTS.

Trustee Act, 1850, *ss.* 2, 10—*Joint Mortgage—Payment off—One of Joint Mortgagees out of Jurisdiction—Vesting Order.*

3 C.L.D. 209, 210

A mortgage of real estate was made to two persons, one of whom afterwards went abroad. Upon a sale of the mortgaged property by the mortgagor, so much of the purchase-money as was payable to the mortgagees was invested in their joint names :—

Held, that the Court had no jurisdiction, upon a Petition presented under the *Trustee Act*, 1850, by the mortgagor and the mortgagee within the jurisdiction, to make an order vesting in the purchaser the estate of the absent mortgagee.

By an indenture dated the 6th of September, 1862, *Frances Osborn* and *Jane Jessard Osborn*, being owners as tenants in common in fee of certain hereditaments in the county of *Kent*, conveyed the same to *Stephen Percy Groves*, *Edward Nathaniel Conant*, and *Charles Ellis* in fee, by way of mortgage to secure £2500 and interest. By an indenture dated the 8th of June, 1867, *Groves*, *Conant*, and *Ellis* assigned their mortgage debt and conveyed the hereditaments subject thereto to *Richard Coleman* and *Robert Potter* in fee.

Frances Osborn and *Jane Jessard Osborn* had both died, having devised their respective moieties of the mortgaged hereditaments to trustees upon trusts for sale ; and the property had accordingly been sold for £6000, but no conveyance to the purchaser had as yet been executed.

Subsequently to the assignment of the 8th of June, 1867, *Robert Potter* left the country and was now resident abroad. So much of the purchase-money as was payable to *Coleman* and *Potter*, as mortgagees of the property, had been invested in their joint names, and

a Petition was now presented under the *Trustee Act*, 1850, by *Coleman* and the devisees in trust under the wills of *Frances* and *Jane Jessard Osborn*, praying that the Petitioners might be appointed to convey to the purchaser the hereditaments comprised in the indenture of the 6th of September, 1862, for all the estate of *Robert Potter* therein.

Mr. *W. W. Streeten*, in support of the Petition, referred to the *Trustee Act*, 1850, s. 10 (1), and contended that *Potter* was now in the position of a trustee residing out of the jurisdiction.

Mr. *Spencer Butler*, for the purchaser, was willing that the order should be made, if the Court had power to make it; but he called attention to the interpretation clause (s. 2) of the Act, which provides that the word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage, and submitted that part of the duty of a mortgagee was to execute a reconveyance when the mortgage debt was paid off; and consequently that the Court had no jurisdiction to make the order prayed for.

July 27. LORD ROMILLY, M.R., after stating the facts, continued:—

The question is, whether the Court will, under these circumstances, make an order appointing a person to convey the estate of the mortgagee, who is out of the jurisdiction.

I am of opinion that an order ought not to be made.

The application is made under the 10th section of the *Trustee Act*, 1850, which provides that the Court may make an order where two persons are jointly seised, and one of them is out of the jurisdiction, but the words "as if the trustee out of the jurisdic-

(1) Sect. 10 of the *Trustee Act*, 1850, is as follows: "And be it enacted, that when any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons, together with any other person or persons in such manner and for such estate as the said Court shall direct: and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate."

M. R. 1871 *In re* OSBORN'S MORTGAGE TRUSTS.

tion" near the close of the section shew that it only applies where the persons are so seised upon a trust. When I come to inquire what is meant by a trust, I find it is provided by the interpretation clause that the word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage; and having regard to that, I think there is no authority in the Court to appoint a person to convey the estate of a mortgagee who has been paid off under such circumstances as occur here.

There are, possibly, two cases in which the Court might have authority under this section to appoint a person to convey the estate of a mortgagee who has been paid off. One is where the advance has been made out of trust funds, and a new trustee has been appointed in consequence of one of the former trustees being resident out of the jurisdiction. In that case the Court would probably make an order, but only at the instance of the *cestui que trust*, not of the mortgagor, who is a perfect stranger to the trust.

Another case may be where two persons advance distinct sums out of their own moneys to make up one single sum; then if each were paid off and gave a receipt in full for all that was due to him, that might amount to a declaration that he was merely a trustee of the legal estate, and the Court might possibly make an order. But this is not that case. Here the Court is asked to dispose of the property of a person in his absence. For aught that I know, he may claim more than has been paid. A deed might be framed containing a provision enabling one of two mortgagees to give a receipt in the name of the other; but in the absence of such a stipulation I cannot make the order.

Solicitors: Messrs. *Markby & Tarry.*

BARTLETT *v.* REES.

M. R.

1871

July 19, 21; *Aug* 4.

Mortgage—Foreclosure—Priorities of Incumbrances—Form of Decree—Interest of Mortgagor vested in the Crown.

In a foreclosure suit, when questions as to priorities not affecting the Plaintiff are raised between co-Defendants, the Court will fix a day certain for all to redeem or be foreclosed, without prejudice to the rights of the several Defendants *inter se*.

In such a suit, where part of the mortgagor's interest is vested in the Crown, the Court will not decree foreclosure in respect thereof, but will give the Plaintiff liberty to apply in Chambers for a sale.

Form of decree.

THIS was a suit by a mortgagee for the foreclosure of the equity of redemption of certain freehold and leasehold premises comprised in six indentures of mortgage, dated the 27th of December, 1860, and an indenture of further charge, dated the 20th of June, 1861, and respectively executed by *William Roupell*, the mortgagor, who was subsequently convicted of forgery.

The Defendants to the suit were *W. H. Rees* and *F. Whitaker*, trustees of a settlement made by the mortgagor; *Sarah Roupell* the elder, *Richard Roupell*, and *Sarah Roupell* the younger, who were *cestuis que trust* thereunder, and claimed a title paramount to the Plaintiffs in part of the premises; *E. T. Whitaker* and *F. T. Woolbert*, who were subsequent incumbrancers; *F. T. Galsworthy*, a mortgagee who had assigned his security to the Plaintiff; *J. Tredwell* and *W. H. Hewitt*, who were judgment creditors of the mortgagor, but had released their claims to the Plaintiff; *G. T. Woodroffe* and *J. Cordery*, who were trustees for the Plaintiff; and the Attorney-General, in respect of the mortgagor's interest in certain leaseholds comprised in the mortgage, which were forfeited to the Crown by reason of the conviction for felony.

There were conflicting claims as to priority between *Rees* and other Defendants; but subject to the reservation contained in the minutes as to *R. Roupell* and *Sarah Roupell* the elder, the Court held the Plaintiff's priority established.

The principal question in the case related to the form of the

M. R. 1871

BARTLETT v. REES.

decree, in consequence of the questions between the co-Defendants as to their respective priorities.

Mr. *Jessel*, Q.C., and Mr. *Faber*, for the Plaintiff.

Mr. *Fooks*, Q.C., and Mr. *Holmes*, for the Defendant *Rees*, asked that the decree might be drawn up as in *Duberly* v. *Day* (1), with successive rights of redemption.

Mr. *Southgate*, Q.C., Mr. *Chitty*, Mr. *Cookson*, and Mr. *Owen*, for other parties.

Mr. *Hemming*, for the Attorney-General.

July 21. LORD ROMILLY, M.R., said that he would not dispose of questions relating to the relative priorities of the co-Defendants, and that the proper decree would be one following the form in *Edwards* v. *Martin* (2), fixing one time for all the Defendants to redeem or be foreclosed, but that it should be without prejudice to the interests of any of the Defendants between themselves, or to the titles set up by the Defendants *R. Roupell* and *Sarah Roupell* the elder.

With respect to the leasehold interest vested in the Crown, his Lordship held that, following *Hancock* v. *Attorney-General* (3), no decree of foreclosure could be made, but the Plaintiff might have liberty to apply in Chambers for an order for sale.

Aug. 4. The case was again spoken to on the minutes of decree.

MINUTES:—Order that an account be taken of what is due to the Plaintiff under or by virtue of his mortgage securities, and that upon the Defendants *E. T. Whitaker*, *W. H. Rees*, *F. Whitaker*, *F. T. Woolbert*, *Sarah Roupell* the elder, *R. Roupell*, and *Sarah Roupell* the younger, or any of them, paying to the Plaintiff what shall be certified to be due to him under or by virtue of all his said securities within six months after the date of the Chief Clerk's certificate, at such time and place to be thereby appointed, the Plaintiff do execute all

(1) 14 Beav. 1. 9/ (2) 7 W. R. 30. (3) 33 L. J. (Ch.) 661.
4 Jur N S. 1044 10 Jur N S. 557

proper and necessary deeds for conveying the hereditaments and premises comprised in his said respective mortgage securities free and clear of and from all incumbrances done by the Plaintiff or any person or persons claiming by, from, or under him, and deliver up upon oath all the title deeds and writings in his custody or power relating to the said premises to the said Defendants, or to such one or more of them as shall so redeem the Plaintiff, or as he or they shall direct, such conveyance or conveyances to be settled by the Judge, in case the parties differ about the same. And it is ordered that in case the said Defendants, or any or either of them, shall so redeem the Plaintiff, the Defendants or Defendant so redeeming the Plaintiff are or is to be at liberty to apply to this Court as he, she, or they may be advised, and on such application it is not to be incumbent on the Defendant or Defendants so applying to give to the Plaintiff notice thereof. But this order is to be without prejudice to any question which may arise as to the rights or interests of the said Defendants as between themselves to or in the said hereditaments and premises; but in default of the said Defendants, or any or either of them, so redeeming the Plaintiff by the time aforesaid, it is ordered that they do stand absolutely barred and foreclosed of and from all right, title, interest, and equity of redemption in and to the hereditaments and premises comprised in the said mortgage securities, and every part thereof, and this decree is to be also without prejudice to the rights of the Crown as regards the leasehold premises comprised in the Plaintiff's mortgage security; and in case of such foreclosure as aforesaid, it is ordered that the Plaintiff be at liberty to hold the last-mentioned leasehold premises until the Crown shall think fit to redeem the same, and that the Plaintiff be at liberty to apply in Chambers for a sale of such leasehold premises. And this decree is to be also without prejudice to the paramount titles set up by the Defendants *R. Roupell* and *Sarah Roupell* the elder as regards the premises affected or alleged to be affected thereby. And it is ordered that all further proceedings in this cause as against the Defendants *J. Tredwell* and *W. H. Hewitt*, who have respectively assigned or released their claims as such judgment creditors as in the bill mentioned, and as against the Defendant *F. T. Galsworthy*, who has as aforesaid assigned his mortgage securities to the Plaintiff, be stayed. And any of the parties are to be at liberty to apply as they may be advised.

Solicitors for the Plaintiff: Messrs. *Woodrooffe & Plaskitt*.

Solicitors for the Defendants: Messrs. *Linklater, Hackwood, & Co.*; Mr. *H. Erle*; Messrs. *Whitakers & Woolbert*; Mr. *J. Galsworthy*; Messrs. *Raven & Bradley*.

M. R.

1871

Aug. 2, 4.

In re RICHARDSON.

Land Registry Act (25 & 26 *Vict. c.* 53) *s.* 17—*Indefeasible Title—Mortgagor with Indefeasible Title—Purchaser from Mortgagee.*

A mortgagor registered with an indefeasible title made three successive mortgages, all of which were entered on the register of incumbrances; the first mortgagee sold under his power of sale, and conveyed the estate to a purchaser:—

Held, that the purchaser was entitled to be registered with an indefeasible title, although the second and third mortgages remained on the register of incumbrances.

In December, 1866, Sir *William Russell* was registered as the owner, with an indefeasible title, of certain real estate. In January, 1867, Sir *William Russell* mortgaged the estate to *Smith* and others for £8800. The mortgage deed contained a power of sale by reference to the statute 23 & 24 Vict. c. 145. In June, 1867, and January, 1868, Sir *William Russell* made two other mortgages. All three mortgages were entered in the register of mortgages and incumbrances.

In June, 1869, the mortgage of January, 1867, was transferred to *Richard Berridge*, and the deed of transfer was duly registered.

In 1871 *Berridge* sold the property under the power of sale, and conveyed it to *Thomas Richardson*, who thereupon applied to be registered as owner in fee simple, free from the incumbrances created by Sir *William Russell*.

The question as to the form of the entry in the register was referred to the Court, under the provisions of the *Land Registry Act* (25 & 26 Vict. c. 53), s. 17.

Mr. *Caldecott*, for Mr. *Richardson*:—

If Sir *William Russell* had conveyed directly to Mr. *Richardson*, without having incumbered his estate, then Mr. *Richardson* would, in accordance with the practice of the Land Registry Office, have been entitled to be registered as owner with an indefeasible title. It cannot make any difference that he has mortgaged, or that the mortgagee, by virtue of the statutory power of sale, has conveyed to *Richardson*. By 23 & 24 Vict. c. 145, s. 15, the person exercising

the power of sale has power to convey to the purchaser the mortgaged property, not only for all the estate which the mortgagee has, but for all the estate and interest which the mortgagor had power to dispose of.

Aug. 4. LORD ROMILLY, M.R.:—

This is one of a class of cases which are extremely unpleasant to me. They are, in reality, *ex parte* appeals from the decision of the Chief Registrar, and but that he is generally kind enough to favour me with a communication on the subject, I should be entirely ignorant of the reasons on which he acted. On the other hand, the Appellant knows nothing of any such communication, and cannot address himself to the points which have weighed with the Registrar.

The present case is shortly this: A first mortgagee sells under a power of sale to a purchaser. The mortgagor has an indefeasible title. The purchaser asks to be put on the register as having an indefeasible title. There is no question as to fraud, or anything of the kind; but there are second and third mortgagees, who are on the register of incumbrances. The purchaser, however, has nothing to do with the application of the purchase-money, and I cannot see why the subsequent mortgages should affect the indefeasibility of the title. The Registrar appears to think that there would be some inconsistency in registering the purchaser with an indefeasible title while the subsequent mortgagees remain on the register; but I do not think that there is any inconsistency. The subsequent mortgagees have no claim against the land; they are entitled to be paid out of the surplus which remains after satisfying the first mortgage; but the purchaser has nothing to do with that; his title is perfectly good, and he is entitled to be registered as indefeasible owner.

MINUTES:—Order that the applicant, *Thomas Richardson*, be entered on the register of title as the owner in fee with an indefeasible title, in the same manner as if he had purchased from the former registered owner without his (the former owner) having created any incumbrances, subsequent to the mortgage to the mortgagee selling to the said *Thomas Richardson*; ~~but his Lordship doth not direct any alteration to be made in the record of incumbrances.~~ varied thus

LC 13 Eq 141

Solicitors: Messrs. *Van Sandau & Cumming.*

M. R.

1871

June 28, 29; *July* 7.

SURTEES *v.* SURTEES.

Will—Gift to "every Son during his Life"—Gift in Succession or to a Class as Tenants in Common—Cross Remainders.

Testator directed his trustees to purchase lands in the counties of *N.* and *D.*, to be settled, on the death of the eldest son of *J. S.* without issue (which happened), to the use of every son of *J. S.* then living or who should be born in testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his decease to the use of such son's first and every other son successively in tail male, and on failure of such issue, to the use of the testator's right heirs:—

Held, that the younger sons of *J. S.* took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross remainders over.

WILLIAM SURTEES, the testator in the cause, having property in the counties of *Northumberland* and *Durham*, by his will, dated the 8th of April, 1830, after devising his several estates therein mentioned in strict settlement, and making certain bequests, gave the residue of the trust funds in his will mentioned to his trustees upon the following trusts:—

"Upon further trust to lay out and invest the residue or surplus of the aforesaid trust moneys in the purchase of freehold lands and hereditaments in the counties of *Northumberland* and *Durham*, and to settle or assure, or cause to be settled and assured, the hereditaments so to be purchased, when and as the same shall be purchased, to the use and intent" that the said trustees should raise thereout certain rent-charges, and, subject thereto, "to the use of *Henry Surtees*, the eldest son of my son *John Surtees*, and the assigns of the said *Henry Surtees* during his life; and after the determination of his estate in his lifetime, to the use of trustees to preserve contingent remainders; and after his death, to the use of the first and every other son successively of the said *Henry Surtees* in remainder, one after another, and the heirs male of the body of each such son, the elder and the heirs male of his body taking before the younger and the heirs male of his body; and on failure of such issue, to the use of every son now living, or who shall come into existence in my lifetime, of the said *John Surtees*, and the

assigns of such son during his life; and immediately after the determination of the estate in his lifetime, to the use of trustees upon trust to preserve contingent remainders hereinafter limited, but to permit such son and his assigns to receive the said rents and profits during his life; and immediately after his decease, to the use of such son's first and every other son successively in remainder, one after another, and the heirs male of the body of each such last-mentioned first and every other son, the elder and the heirs male of his body taking before the younger and the heirs male of his body; and on failure of such issue, to the use of my own right heirs for ever."

The testator died in 1832. At the time of his death *John Surtees* had seven sons living, namely, *Henry Surtees, Arthur Surtees, Scott Surtees, Villiers Surtees, Nathaniel Surtees, Richard Surtees,* and *Alfred Surtees.*

Arthur Surtees and *Villiers Surtees* died in the lifetime of *Henry Surtees,* and left no issue.

Henry Surtees died in 1870, without issue; and on his death the question arose as to the interests of the other sons of *John Surtees* in the estates purchased under the testator's will—whether they took successive life estates in the whole, in which case *Scott Surtees,* the eldest surviving son, would be entitled as first tenant for life; or whether the gift "to every son of *John Surtees*" was a gift to all the younger sons collectively, and whether as tenants in common, with cross remainders over in tail male.

Nathaniel Surtees, Richard Surtees, and *Alfred Surtees* each had male issue living.

The Plaintiffs in the suit were the said *Richard Surtees* and *Alfred Surtees,* who were the present trustees of the will, as well as interested under it. The Defendants were the surviving sons and grandsons of *John Surtees.*

Mr. *Jessel,* Q.C., and Mr. *Phillpotts,* for the Plaintiffs:—

The question in this case is, what interest the younger sons of *John Surtees* became entitled to, under the will, on the death of *Henry Surtees.* To ascertain this it is necessary to give effect, as far as possible, to the exact words of the will. The limitations are, "To the use of every son now living, or who shall come into

M. R. 1871 SURTEES v. SURTEES.

existence in my lifetime, of the said *John Surtees*, and the assigns of such son during his life," with remainder to the use of trustees to preserve contingent remainders; but "to permit such son and his assigns to receive the rents during his life," with remainder to the use of such son, and his first and every other son successively in tail male.

We contend that, under these words, the younger sons all take as tenants in common for life. It will be contended, on behalf of the Defendant *Scott Surtees*, that he is entitled to a life interest in the whole, but to support that contention the word "successively" must be supplied after the words "to the use of every son of *John Surtees*," and there is no principle of construction which requires such an addition, it being now clearly settled that in construing wills the Court will adhere, as far as possible, to the exact words used by the testator: *Grey* v. *Pearson* (1); *Roddy* v. *Fitzgerald* (2); *Shore* v. *Wilson* (3). In *Evans* v. *Astley* (4), Lord *Mansfield* held that words might be supplied to give successive estates tail rather than a tenancy in common; but there he considered that there was enough in other parts of the will to support that construction, a consideration which would not now be held to justify importing words into a will. Besides, the words in the will, as they stand, are inconsistent with the idea of successive estates; the plain meaning of the testator is, that all the younger sons take as tenants in common for life, and cross remainders over must be implied.

Mr. *Swanston*, Q.C., and Mr. *Charles Hall*, for the sons of *Richard Surtees*:—

These Defendants are in the same interest as the Plaintiffs. In *Lewis* v. *Waters* (5) there is a judicial interpretation of the words used in this will. In that case there was a limitation "to the first and other sons of *David Ormond*," and Lord *Ellenborough* observed that the expression used denoted that the sons should take successively as plainly as if that word had been used; otherwise, if he had meant that all the sons should have taken together, he

(1) 6 H. L. C. 61. 3 Jur. N.S. 823 (3) 9 Cl. & F. 355.
(2) Ibid. 823. (4) 3 Burr. 1570.
(5) 6 East, 336, 342.

would have used the words "all and every," or other analogous expressions. So here the use of the words "every son" imports that the estate is to go to all the younger sons as tenants in common: *De Windt* v. *De Windt* (1).

The words shew that the younger sons are to take collectively; if not, in what order are they to take? The law will not presume an intention of regarding seniority where it is not expressed. In *Hope* v. *Potter* (2), Vice-Chancellor *Wood* considered the two classes of cases where the Court would supply words in a will, neither of which are applicable to the present case.

Mr. *Chitty*, for two of the grandsons of *John Surtees*, contended that under the words, "to the use of such son's first and every other son successively in remainder, and the heirs male of the body of such first and every other son," there must be implied cross remainders over in tail male as to each son's share on his death. [He cited *Atkinson* v. *Holtby* (3).]

Mr. *Southgate*, Q.C., and Mr. *Macnaghten*, for *Scott Surtees*:—

Under this gift, which is in the form of an executory trust, *Scott Surtees*, as the eldest surviving son of *John Surtees*, is entitled to the whole estate for his life. Where there is a previous gift to an eldest son and to his first and other sons in tail, and then a gift in remainder to younger sons, then the ordinary rule as to succession in property will prevail. The evident intention is that the property to be purchased by the trustees is to be enjoyed as a whole. This may be inferred from the direction to the trustees to purchase lands in *Northumberland* and *Durham*, for he cannot be supposed to have intended the lands so purchased as a family estate to be afterwards divided.

The use of the words "every son" after the gift to *Henry* imports that each is to enjoy the whole for his life. This is confirmed by the words "the assigns of such son," shewing by the use of the singular "son" that he meant each son after *Henry* to take in succession. In *Cradock* v. *Cradock* (4), after devising an estate for life to *A.* and *B.* in succession, a testator devised the same

(1) Law Rep. 1 H. L. 87.
(2) 3 K. & J. 206, 209.
(3) 10 H. L. C. 313
(4) 4 Jur. (N.S.) 626.

M. R. 1871 SURTEES v. SURTEES.

estate to the first son of *B.* in tail male, and in default of such issue, to the second, third, and all and every other the son and sons of *B.* severally and successively in tail male, and in default of such issue, to the third and all and every other the son and sons of *A.* and the heirs male of such son and sons, and in default of such issue, to the testator's right heirs. Upon the death of the survivors of *A.* and *B.*, it was held by Vice-Chancellor *Stuart* that the devise to the third and all other the sons of *A.* gave them estates in succession in tail male, and that the third son took the entirety. There the words were "all and every other the son and sons," making it a stronger case than this. *Lewis* v. *Waters* (1) is also an authority in our favour.

Sir *R. Baggallay*, Q.C., and Mr. *Cookson*, for *Nathaniel Surtees* and his son, referred to *Gordon* v. *Atkinson* (2).

July 7. LORD ROMILLY, M.R.:—

The question in this case is as to the construction of certain limitations contained in a will. I have read through the will very carefully, and I have also consulted all the authorities which were cited to me; but I do not think the authorities have much to do with it, for, as it has been laid down very correctly in many cases, the only subject to be considered is, the effect of the words of the will.

The testator, after devising the estates in his will mentioned in strict settlement, directed his trustees to invest the residue of certain trust moneys "in the purchase of freehold lands and hereditaments in the counties of *Northumberland* and *Durham*, and to settle and assure, or cause to be settled and assured, the hereditaments so to be purchased when and as the same shall be purchased;" upon this it is said that the testator obviously shewed a strong desire that all the property purchased should be in the counties of *Northumberland* and *Durham*, in which he had a great interest; and also that the terms of this trust are executory—that is, it is given upon trust to settle and assure, or cause to be settled and assured the lands, as and when the same shall be purchased.

(1) 6 East, 336. (2) 1 De G. & Sm. 478.

Then, after certain charges, the uses of the lands so to be purchased are declared. The first limitation is to the use of *Henry Surtees*, the eldest son of *John Surtees*, for life, with remainder to his first and other sons in tail male; "and on failure of such issue, to the use of every son now living, or who shall come into existence in my lifetime, of the said *John Surtees*, and the assigns of such son during his life." If I stop there, it is quite clear that it is a gift to all the sons, and that it is an express, clear, and distinct direction that every son then living, and every son who shall come into existence in the testator's lifetime, of the said *John Surtees*, and the assigns of such son during his life, shall take an interest in this fund. Every son taking an interest, the question may arise whether they take as joint tenants, or as tenants in common; but, unless it is altered by what follows, it is quite clear that they all take together. I am, however, asked to put in words to this effect: "To the use of the second and every other son now living, or who shall come into existence during my lifetime, of the said *John Surtees*, 'successively one after another.'" I am quite clear I cannot do that, as it would be altering entirely the frame of the limitation. By the words, "to the use of every son now living, or who shall come into existence," it is clear that every son who was then living, or who should come into existence, must take an interest in this fund. Upon that point I think the late cases in the House of Lords clearly lay down the rule. One of the first, *Grey* v. *Pearson* (1), was decided by Lord *Wensleydale* and other law lords, and has been followed subsequently; and it was to this effect, that there is no good sense or reason in trying to modify the frame of a will by reason of what you suppose ought to have been the intention of the testator. It has been contended that this testator shewed a great desire to have the property in the counties of *Northumberland* and *Durham*. I am not at all clear that, by giving it to all the sons, he might not secure a larger portion of it being kept within those counties than if he gave it to his second and other sons in succession, because, if one tenant in tail wished to dispose of his interest, he would get rid of the whole property. But, whether that is so or not, all I can say is, if such was his intention, he has not expressed it. I think the only safe mode of

(1) 6 H. L. C. 61.

M. R. 1871 SURTEES v. SURTEES.

proceeding is to go upon the principle of following the exact meaning of the words in the will.

There is another question, as to the form in which the sons are to take. The words, "to the use of every son now living, or who shall come into existence in my lifetime, of the said *John Surtees*," if taken alone, would imply a joint tenancy; but I am of opinion that the subsequent words shew that there was meant to be a division, and that, upon the principle which has constantly been followed when an estate has been given to a certain number of persons, and afterwards to the first and other sons of each of them, this is a sufficient indication that the testator intended them to take as tenants in common. The clause in the will continues thus: "And the assigns of such son during his life, and immediately after the determination of his estate in his lifetime, to the use of trustees to preserve contingent remainders." It was suggested that by using the words "such son" in the singular, it was clear that he intended to mean only the second and other sons, each taking in succession. I do not think so. He has used the word "son" with the word "every" before it; and then he says, "the assigns of such son during his life"—that is, of every such son. No doubt it might have been much more accurately expressed if he had clearly directed that each and every son should take distinctively; but, in my opinion, he means "every son, and the assigns of every such son during his life;" and by the words "immediately after the determination of his estate in his lifetime" he means the estate of every such son—that is, instead of repeating the limitations for each son, he has said that they apply separately to each son. Then follows the usual limitation: "To the use of such son's first and every other son successively in remainder, one after another; and the heirs male of the body of each such last-mentioned first and every other son, the elder and the heirs male of his body taking before the younger and the heirs male of his body; and on failure of such issue, to the use of my own right heirs for ever." It is said that this applies to one son, which I agree it does; but it only means that it is to be treated distributively as to each of the sons who take a share in the property; and in my opinion, consequently, it shews they must take as tenants in common, and that the property is given among all those

sons as tenants in common for life, and that, on the death of each son, his share is to go to that son's first and other sons in tail male, with cross remainders over, which must be inferred, and with an ultimate remainder to the testator's right heirs.

It is rather doubtful whether this construction is in accordance with some of the earlier cases cited, particularly *Evans* v. *Astley* (1), in which Lord *Mansfield* expresses his horror at supposing there should be six or seven jointures on the estate; yet I am quite clear the subsequent course of decisions has been in favour of following the exact words of the testator's will. In doing so in this case I give the sons of *John Surtees* separate estates and separate portions; and I will make a declaration to that effect.

Solicitors: Mr. *A. W. Surtees;* Messrs. *Shum & Crossman,* agents for Messrs. *Stanton & Atkinson, Newcastle-upon-Tyne.*

(1) 3 Burr. 1570, 1582.

V.-C. M.

1870

Nov. 23, 24, 25; *Dec.* 23.

WRIGHT *v.* PITT.

Mining Lease—Jurisdiction—Decree for Account against Equitable Owner of Lease.

The Plaintiff granted a lease or license to mine under certain lands to two persons as trustees for a mining company. The company repudiated the lease, and alleged that they were entitled to mine under the custom of the district independently of the lease, and proceeded to mine accordingly. The applicability of the custom to the particular lands was disputed by the Plaintiff. The Plaintiff filed his bill against the surviving trustee and the managing committee of the company, praying that the lease might be declared binding, not only at law on the trustee, but also in equity on the partners in the company, and that the trustee at law and the other Defendants in equity were bound by the covenants in the lease; the bill also prayed an account, and that the trustee or the company might be ordered to pay to the Plaintiff the royalty to which he was entitled under the lease, and an injunction to restrain the working of the mine except in accordance with the lease:—

Held, that the lease must be treated as binding in equity on the company, and decree made in accordance with the prayer against the company.

Walters v. *Northern Coal Mining Company* (1) and *Cox* v. *Bishop* (2) considered.

THE Plaintiff, *James Wright*, was the owner of certain land in the parish of *Eyam*, in *Derby*. The first Defendant, *John Pitt*, was the surviving lessee of the lease under which the questions in the cause arose. The Defendant *Thomas James Parker* and all the other Defendants were the present managing committee of an unincorporated mining partnership, called the *Eyam Mining Company*, which was established in 1848, and contained a large number of so-called shareholders.

Prior to the year 1852 a peculiar custom of mining existed in the county of *Derby*, which was regulated by an Act of Parliament passed in 1852 (14 & 15 Vict. c. clxiii.), entitled the "*Derbyshire Mining Customs and Mineral Courts Act.*" The custom was therein stated to be, "That it is lawful for all the subjects of this realm to search for, sink, and dig mines or veins of lead ore upon, in, or under all manner of lands of whose inheritance soever they may be (churches, churchyards, places for public worship, orchards, gardens, pleasure-grounds, and highways excepted)." But by the 26th sec-

(1) 5 D. M. & G. 629. (2) 8 D. M. & G. 815.

tion of the Act it was provided as follows: "Whereas the owners of certain lands and hereditaments within the manor or liberty of *Eyam*, usually called 'ancient freeholds,' claim to be exempt in respect of the said lands and hereditaments from all mineral customs heretofore in force, and from the jurisdiction of all Barmote Courts heretofore in existence, and of any steward thereof, be it therefore enacted, that until it shall be found by law that the said lands and hereditaments are subject to such customs and to such jurisdiction, nothing in this Act shall extend any mineral law or laws, custom or customs, to the said lands and hereditaments, or any of them; nor to give any authority to search for mines or veins of lead ore in, under, or upon any of the said lands or hereditaments; nor to extend the jurisdiction of any great or small Barmote Court, or the steward thereof, to the said lands or hereditaments, or any of them; nor otherwise to affect any right or interest whatsoever of any of the owners of the said lands and hereditaments: Provided always, that until it shall be found by law that the said lands and hereditaments are subject to such customs and such jurisdiction, the authority of the Barmote Courts and steward, and all customs to which such lands and hereditaments are now subject, shall remain in full force."

The bill alleged that the lands belonging to the Plaintiff were part of those alluded to in the above section of the Act, and that as they had never been found by law subject to the custom, they were therefore excepted from the operation of the Act.

In consequence of doubts having arisen as to whether the company could lawfully work mines under the lands belonging to the Plaintiff and other persons in the district, negotiations took place between the Plaintiff and the *Eyam Mining Company*, which resulted in a lease being executed on the 29th of November, 1855, between the Plaintiff of the one part, and the Defendants, *John Pitt*, the chairman of the company, and *John Fordham*, the treasurer, of the other part, whereby the Plaintiff demised unto *John Pitt* and *John Fordham*, and the survivor of them, and the executors, administrators, and assigns of such survivor, full and free liberty, license, power, and authority to make, drive, and open, and also cleanse and keep in repair a sough, level, or water-gate, in and under the lands of the Plaintiff, comprising about ten acres and a

V.-C. M. 1870 WRIGHT v. PITT.

half, which were then in the occupation of *Peter Wright* and the Rev. *E. Bagshawe*, together with full and free liberty, license, power, and authority to and for the said *John Pitt* and *John Fordham*, and the survivor of them, and the executors, administrators, and assigns of such survivor from time to time at their will and pleasure, and at their own costs and charges, to raise, get, and work all the mines and veins of lead ore within or under the said lands, or so much thereof as could be got, by virtue of the said sough, level, or water-gate; to hold the said liberties, privileges, mines, and veins of lead ore for the term of 500 years, yielding and paying one-twelfth part, or share, of the lead ore to be from time to time produced and obtained by the said lessees or lessee. It then provided that the payments in respect of the lead ore should never in any one year exceed the sum of £200, and that no part of the produce should be taken away until it should have been weighed or measured.

The Defendants, in ignorance of the existence of the lease of 1855, commenced working under the Plaintiff's land in the year 1866, whereupon the Plaintiff claimed to be entitled to his twelfth part of the produce under the terms of this lease. The claim was made by a letter addressed to the committee of the *Eyam Mining Company* and to *Thomas James Parker*, who had succeeded Mr. *Pitt* as chairman of the company. *John Fordham* was then dead. To this letter Mr. *Parker* replied that the committee were not cognisant of any such lease as that alluded to by the Plaintiff, and after the discovery of the lease the authority of *Pitt* to accept it as trustee for the company was disputed, and ultimately the company claimed to continue working under the custom, and denied the right of the Plaintiff under the lease. This bill was then filed to substantiate the Plaintiff's claim.

The decree asked was—that the lease of the 29th of November, 1855, might be declared binding, not only at law on the Defendant *John Pitt*, but also in equity on the other Defendants, and on all other the partners in the *Eyam Mining Company;* and that the said *John Pitt* at law, and the other Defendants and other partners in equity, were bound by the covenants of the lease. That an account might be taken of the twelfth part of the said lead ore, and the value thereof; and that the Defendant *John Pitt*, or the

said company, might pay the value thereof, not exceeding £200 per annum, to the Plaintiff; and the bill prayed an injunction to restrain the Defendants from getting any ore or carrying on any works in or under the Plaintiff's land otherwise than under and by virtue of the lease, and in accordance with the covenants in that behalf therein contained.

Evidence was produced which satisfied the Court that the lease in question was duly authorized by the then committee of the company. Evidence was also gone into on the question whether the Plaintiff's land was or was not subject to the custom prior to the passing of the Act. It was not disputed that the company had been required to pay the mineral dues under the custom to the lord of the field; but the Plaintiff insisted that, whether the dues were payable or not, the right of mining under the custom did not extend to his land.

Mr. *Jessel*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Bagshawe*, for the Plaintiff:—

The object of this suit is to obtain from the company the value of the ores which were worked under the Plaintiff's land. The Defendants contend that they are entitled to work the mines under the *Derbyshire* mining custom. If it were necessary to go into that question, we could shew that the custom has no application to this mine; but we are not driven to do so, because the Defendants accepted a lease from the Plaintiff in the year 1855, which was the result of long negotiations between the parties. Under that lease provision is made for the proper working of the ore, and for payment of specific sums by way of royalty to the Plaintiff. In 1854 the question of the exemption of these lands from the custom was in dispute. It was to settle the dispute, and to enable the company to work the mines legally, that the lease of 1855 was executed. The company, in 1866, asserted that no such lease was ever granted; but if it was, then that the Defendant Mr. *Pitt* and Mr. *Fordham* were not trustees of this land for them, and that the managing committee of the partnership had no power to sanction such a lease. The evidence is distinct upon these points. The lease has now been discovered, and the affidavits which have been filed shew that the affairs

V.-C. M. 1870 WRIGHT v. PITT.

of the partnership were conducted by the managing committee, who were the only persons having power to act in the affairs of the company; and that, in pursuance of their powers, they directed the lease to be prepared by their solicitor; and Mr. *Pitt* and Mr. *Fordham* were the trustees in whose names the lease was taken, with the sanction and concurrence of the then managing committee.

It is further alleged by the Defendants that the Plaintiff cannot sue the company, who are only *cestuis que trust*, but must sue *Pitt* alone. This lease, though designated as such, is in effect a license to get certain minerals, on condition that a part of the gettings is paid to the landlord. The company must either be working under the license, and then they must submit to the terms of such license and pay us the dues we are entitled to; or they are doing it without license, and then they must shew that they are working under the custom, and that they have performed the necessary preliminaries, and have obtained the license of the bar master to entitle them to work.

[The VICE-CHANCELLOR:—I do not see why you should not have recovered the rent in an action against *Pitt*.]

We are not bound to bring an action, but may come to this Court for an account of the ore gotten by the company; and we ask for an injunction that no part of the ore produced be taken away until it is measured. If we are entitled to an injunction, we are entitled to damages in equity for the loss we have sustained.

In the case of *Jesus College* v. *Bloome* (1), which was a bill for an account and satisfaction for waste in cutting down trees against an assignee of the lessee of the college, Lord *Hardwicke* said: "One of the cases cited was that of a mine, which is a sort of trade, and an account was therefore necessary; and there are many cases in which this Court has made decrees in the cases of mines, which could not have been done in cases of timber." The equitable jurisdiction is put by him upon this: to prevent a multiplicity of suits.

In *Pulteney* v. *Warren* (2), an account of mesne profits was decreed against executors upon the special ground that the Plaintiff was prevented from recovering in ejectment by a rule of the Court of Law; but Lord Eldon said: "The case of mines is very

(1) 3 Atk. 262. (2) 6 Ves. 73, 89.

different on another ground. There the bill will originally lie against the party himself; if not, I do not know that originally it could be brought against the personal representative;" and in *Parrott* v. *Palmer* (1), Lord *Brougham* pointed out the peculiarity in respect of mines, and said: "From the whole it may be collected, that, although as to timber there exists considerable discrepancy, yet the sound rule is to make account the incident and not the principal where there is a remedy at law; but that mines are to be otherwise considered, and that as to them the party may have an account even in cases where no injunction would lie."

In *Ernest* v. *Vivian* (2), where a bill was filed to set aside a lease on the ground of fraud, and for an injunction or an account, it was held that, on the ground of laches alone, the Plaintiff was not entitled to a decree on the first part of his prayer, but it was without prejudice to his filing a bill for an account on the footing of the validity of the lease.

In the *Great Western Railway Company* v. *Rous* (3), there was a lease of land with mines, and a covenant on the part of the lessee to pay a royalty upon any coal which should be raised within the distance of twenty miles from any part of the demised premises, and should be brought through, over, or under the said land; an underlease was granted by the lessee to the railway company, and it was held that the company was bound by the covenant, and was liable to pay the royalty.

If we have a right to come into equity against trustees, and they have a right over against the *cestui que trust*, then we have a right to go against the *cestui que trust* in the first instance, to avoid circuity of suit. In other words, the Plaintiff is not bound to sue *Pitt*, the trustee, but is at liberty to sue the company, who are the *cestuis que trust*: *Castellan* v. *Hobson* (4).

Mr. *Osborne*, Q.C., and Mr. ~~*Turner*~~, for the Defendant *Pitt*:—

As no decree is asked against us, we need not address the Court. Mr. *Pitt* pledges himself that he took the fee as trustee for the company, and of course he prefers that the suit should be prac-

(1) 3 My. & K. 632, 642.
(2) 33 L. J. (Ch.) 513.
(3) Law Rep. 4 H. L. 650.
(4) Ibid. 10 Eq. 47.

V.-C. M. 1870 WRIGHT v. PITT.

tically against the persons from whom he would otherwise have to recover.

Mr. *Glasse*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Hemming*, for the Defendants:—

The mining custom in the county of *Derby* is admitted to be a right to search for, sink, and dig mines or veins of lead ore, in or under all manner of lands, with certain exceptions; and it is alleged that the Plaintiff's lands are exempted from that custom; then the lease granted by the Plaintiff gives the Defendants a licence to make, drive, and open and cleanse and keep in repair a sough, level, or water-gate, in and under the lands of the Plaintiff, and to raise, get, and work all the mines and veins of lead ore within such lands. Now it is said that under this so-called license we are working under the Plaintiff's land, but the fact is that we are not working under the license, but we are following a vein of lead ore which has already been opened upon other lands, and this we are doing under a custom which is not touched by the license. We have not made, driven, or opened a sough, level, or water-gate, upon the Plaintiff's land, and therefore we are not doing anything that would require a license; we are acting strictly under the custom in following a vein, and not under the license, which we do not require for this purpose, and which the Plaintiff had no power to grant or withhold: *Hardy's* Miners' Guide (1).

The real question is, whether we are to pay a royalty of one-twelfth of the gettings to the lord of the manor, and another twelfth to the Plaintiff, or to pay only one-twelfth in all. We object to pay more than one-twelfth, but we do not care to whom this one-twelfth is paid. First, then, we say that the lease was not binding upon the partners in this association, and this rests upon the evidence. Secondly, we say that if we are bound by the lease we are doing nothing which comes within the terms of that lease.

Then as to the principle upon which this suit is instituted. The Plaintiff is supposed to have granted the lease to *Pitt* in trust for the company; but the suit is not instituted against *Pitt*, for no decree is asked against him. The decree is asked against the company, who are the *cestuis que trust*, and it is not in the power of the

(1) 1st Ed. pp. 30, 31.

Court to make such a decree. This was decided in the case of *Walters* v. *Northern Coal Mining Company* (1), where a lease of coal mines was granted to trustees on behalf of the company. The representative of the lessor filed a bill against the company, seeking to recover the arrears of rent as an equitable debt due from the company; and it was held that no relief could be given in equity, and the bill was dismissed. The relation between the occupiers and the lessee as *cestui que trust* and trustee cannot give any equitable right to the lessor, who claims by a title paramount. The landlord has his legal remedy by distress, or he may bring his action against the lessee; but he cannot file his bill against the *cestui que trust.* Even assuming the fact that the lease was accepted by the company as *cestuis que trust,* still such an acceptance does not entitle the lessor to any relief in this Court. The same principle was adopted in *Cox* v. *Bishop* (2), where there was an agreement to take an assignment of a lease, followed by possession on the part of the equitable assignee; and this was held not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease. Lord Justice *Turner* there said: "The bill states no impediment for which the interference of this Court could be required; therefore you must take your remedy at law." Those cases cannot be distinguished from this; and in *Great Western Railway Company* v. *Rous* (3), which has been relied on, the point did not arise, as both sides desired that the lease should stand, and the only dispute was the construction of the covenant.

When we entered upon the Plaintiff's land we had no knowledge of the lease; we were led to believe that there was no lease, and we have never claimed under it. In every view of the case, therefore, the lease is a mere nullity, and the Court cannot disturb us in our possession.

Mr. *Jessel,* in reply.

Sir R. Malins, V.C., after stating the facts of the case and the evidence at some length, continued:—

It will be seen from the correspondence and the documents in this case that the Defendants set up two defences to the Plaintiff's

(1) 5 D. M. & G. 629. (2) 8 D. M. & G. 815.
(3) Law Rep. 4 H. L. 650.

V.-C. M. 1870 WRIGHT v. PITT.

claim: first, total ignorance of the existence of the lease, and want of authority to the trustees to accept it; secondly, the right to mine under the Plaintiff's land, as being subject to the custom of *Derbyshire*. I am of opinion that the evidence effectually displaces both grounds of defence.

The documents and the evidence shew that the lease of November, 1855, was executed after the fullest and most mature deliberation on the part of the company, with a full knowledge of all the facts of the case, and as a settlement of a doubtful question —whether the lands were or were not subject to the mining custom. The company, therefore, obtained a right of mining on the Plaintiff's land, as they are now doing, and are, in my opinion, clearly bound by the terms of the lease so entered into.

With regard to the defence set up of the right to work under the lands by virtue of the custom, I am of opinion that the evidence of the Defendants fails to prove that the lands are subject to the custom; but the point is unimportant, because, being of opinion that the lease must be treated as binding on the Defendants, by that they have precluded themselves from the right to set up the custom against the Plaintiff. They have put themselves in the position of tenants to the Plaintiff; and nothing is more clearly settled than that a tenant is estopped from denying the title of his landlord. The affairs of this company, like the affairs of all other companies, were conducted by the directors, though they call themselves a managing committee, which is precisely the same thing; and I am of opinion that it was within the power of a managing committee for the time being to bind, not only the parties, members of the partnership, but all who should succeed them in the business. I am, therefore, of opinion that the lease is binding upon the company, and that the Plaintiff is entitled to the relief he asks.

The right to an account under a lease of mines is clearly settled by the authorities which were cited by the Plaintiff's counsel, and particularly by the cases of *Jesus College* v. *Bloome* (1), *Parrott* v. *Palmer* (2), and fully considered in *Great Western Railway Company* v. *Rous* (3). If, therefore, this bill had been against the lessee *Pitt* only, the right to the account would have been a matter of

(1) 3 Atk. 262. (2) 3 My. & K. 632. (3) Law Rep. 4 H. L. 650.

course; and though, according to the decision of Lord *Cranworth* in *Walters* v. *Northern Coal Mining Company* (1), and the Court of Appeal, consisting of Lord Justice *Knight Bruce* and Lord Justice *Turner*, in *Cox* v. *Bishop* (2), the company, as *cestuis que trust* of a lease, are not liable to be directly sued; they must, I think, be treated as having worked under the authority of the lease, and as subject, therefore, to the payment which it imposes; or they must be treated as trespassers, and liable to account as such.

The decree will be in accordance with the prayer of the bill, and there will be an order for payment of costs against *Thomas James Parker* and all the other Defendants, except Mr. *J. Pitt*, whose costs will be paid by the Plaintiff and added to his own costs, to be recovered against the other Defendants.

MINUTES OF DECREE:—Declare that the indenture of lease granted by the Plaintiff to the Defendants *John Pitt* and *J. Fordham* (deceased), dated the 29th of November, 1855, in the bill mentioned, is binding not only at law upon the Defendant *John Pitt*, but also in equity upon the other Defendants, and on all the partners in the partnership called the *Eyam Mining Company*, and that the Defendant *J. Pitt* at law, and the other Defendants and other partners in equity, are bound by the covenants contained in the said indenture of lease during the continuance thereof; that an account be taken of the twelfth part of the lead ore from time to time got out of and raised by the Defendants or by the partnership from and out of the mines and premises comprised in the said indenture of lease, and the value of such twelfth part, and that the Defendants do pay to the Plaintiff the value of such twelfth part of the said lead ore, not exceeding the sum of £200 per annum; that an injunction be awarded to restrain the Defendants and the other members of the partnership, their engineers, agents, and servants and workmen, from getting any ore or carrying on any works, or using any way-leave or passage in or under the Plaintiff's land in the said indenture of lease mentioned, or any part thereof, otherwise than under and by virtue of the said indenture of lease, and in accordance with the covenants in that behalf therein contained, and so long as they shall duly perform such covenants; that the costs of *John Pitt* in this cause be taxed and paid by the Plaintiff, and added to his own costs; that the costs of the Plaintiff be taxed, and such costs, together with the costs of *John Pitt*, be paid by the other Defendants; with liberty to any of the parties to apply to this Court as they may be advised.

Solicitors for the Plaintiff: Messrs. *Palmer, Eland, & Nettleship.*
Solicitor for the Mining Company: Mr. *Munton.*
Solicitors for Mr. *J. Pitt*: Messrs. *Singleton & Tattershall.*

(1) 5 D. M. & G. 629. (2) 8 D. M. & G. 815.

V.-C. M.

1871

June 2.

Ex parte MORRIS.

Railway Company—Lands Clauses Act, ss. 80, 82—*Money deposited under s.* 85—*Arrangement with Vendor—Costs of abortive Proceedings—Headings of Parts of the Act.*

Land was taken by a railway company under the *Lands Clauses Act*. The company, wishing to take possession, paid a sum of money into the bank under sect. 85 of the Act, and proceedings were taken to summon a jury. An agreement was then come to, fixing the price for the land, and the company agreed to pay all such costs, charges, and expenses as they were liable to pay under the *Lands Clauses Act*, or otherwise:—

Held, that they were liable to pay the costs of the vendors in the proceedings to summon a jury

UNDER the provisions of an Act of 1866, and of the *Cheshire Lines Act*, 1867, the *Manchester, Sheffield, and Lincolnshire, Great Northern, and Midland Railway Companies*, were authorized to construct a railway near *Warrington*. Their powers were to be exercised by a committee called the *Cheshire Lines Committee*, constituted by the *Cheshire Lines Act*, 1867, which also authorized them to take land under the *Lands Clauses Consolidation Act*, 1845.

The committee served the usual notice to take a piece of land belonging to *Ellen Morris* and *George Bowen*, and negotiations were commenced for purchasing it. Before the price was agreed upon, the company desired to take possession. They accordingly deposited a sum of money in the branch *Bank of England* at *Manchester*, in accordance with sect. 85 of the *Lands Clauses Act*, and thereupon entered into possession. Proceedings were then commenced to summon a jury to assess the amount of the purchase-money and compensation.

Before the proceedings came to a hearing, an agreement was come to between the vendors and the committee. This agreement was dated the 31st of October, 1870, and after fixing the purchase-money and compensation at £1450, and making arrangements respecting the title, continued as follows:—

"The purchase-money, with interest thereon, after the rate of £5 per cent. per annum, from the date when the committee took possession of the said premises, and all such costs and expenses of

V.-C. M. 1871 *Ex parte* MORRIS.

the vendors as the committee are liable to pay under the *Lands Clauses Consolidation Act*, 1845, or otherwise, to be paid by the committee on the 25th day of November next."

The agreement was carried into effect, and the committee paid the £1450 and interest, but they declined to pay any costs except the conveyancing costs payable under the 82nd section of the *Lands Clauses Act*, leaving unpaid the costs incurred in the proceedings to summon the jury.

The vendors thereupon presented a Petition praying that the committee might be ordered to pay all the costs incurred in the proceedings to summon a jury, and in the negotiations under sect. 80 of the Act.

Mr. *Charles Hall*, for the Petitioners:—

It was determined, in *Ex parte Buck* (1), that nothing but conveyancing costs could be recovered under sect. 82 of the Act. It is therefore necessary to apply for these costs under sect. 80, which begins very comprehensively, "In all cases of money deposited in the bank." These words have been held to apply to all cases of money deposited, whether under the earlier or later sections: *Ex parte Flower* (2), which completely covers the present case.

Mr. *Speed*, for the committee:—

The costs payable under the Act are classified in *Ex parte Buck*, and it is beyond question that these costs cannot be recovered as conveyancing costs.

Then, as to sect. 80, it is now determined that the *Lands Clauses Act* must be interpreted by reference to the headings by which the various divisions of it are marked off: *Hammersmith and City Railway Company* v. *Brand* (3); *Eastern Counties and London and Blackwall Railway Companies* v. *Marriage* (4). Section 80 comes under the heading "and with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating or not making title, be it enacted." It is therefore clear that it does not include parties who have come

(1) 1 H. & M. 519.
(2) Law Rep. 1 Ch. 599.
(3) Law Rep. 4 H. L. 171.
(4) 9 H. L. C. 32.

V.-C. M. 1871 *Ex parte* Morris.

to a complete arrangement. *Ex parte Flower* (1) was a case of a partial arrangement only; not like the present case, where everything was arranged.

Sir R. Malins, V.C., after stating the facts, continued:—

To my mind, nothing can be more clear than that the railway company agree to give £1450 for the land, with interest to be paid from the date of the agreement, together with all costs properly incurred by the landowner up to that time. It was the proper course for the landowner to take steps to have the price of the land assessed by a jury. Of that fact the railway company were perfectly aware, and if they intended to exempt themselves from the payment of any part of these costs, it was their bounden duty to insert that exception in the contract. They have not done so; but, in my opinion, in the plainest language they have bound themselves to pay all the costs which the landowner would have been entitled to claim on that day, just as if the verdict of the jury had been given.

Then it has been argued, on the authority of *Ex parte Buck* (2), that the deposit under the 85th section is not brought within the 80th section, which obliges the railway company to pay all costs when deposits are made, but the very same point was brought before the Court of Appeal in *Ex parte Flower* (1); and though *Ex parte Buck* was relied upon by the railway company, the Lord Justice *Knight Bruce* said: "The Vice-Chancellor [*Stuart*] was right in point of principle, precedent, propriety, and substantial justice, in ordering the company to pay these costs, unless it can be shewn that under the Act of Parliament he had no jurisdiction to do so. Nothing has been read from the Act of Parliament, and no authority has been produced shewing that he had not that jurisdiction under the 80th section of the Act, and I am of opinion that His Honour's order is clearly right." Lord Justice *Turner* says: "I am of the same opinion, and feel no doubt that the Vice-Chancellor had, under the 80th section, jurisdiction to order the company to pay these costs. The first question is, whether Mr. *Dax's* award interposes any bar to the exercise of this jurisdiction,

(1) Law Rep. 1 Ch. 599, 602. (2) 1 H. & M. 519.

and I am of opinion that it does not, for it is clear to me, upon the correspondence, that it was not the intention of either party that Mr. *Dax* should take into consideration what costs should be paid by the company; all that was intended was that he should tax the conveyancing costs, under which head these costs do not come. The case, then, turns entirely on the construction of sect. 80. Now, there cannot be any doubt that these are costs incurred in consequence of the taking of the lands, and so far they are clearly within the section. But it was urged that the section did not apply at all, because the money was not deposited in Court under the prior sections, but under sect. 85" [that is the very case I have to deal with]. "I am, however, clearly of opinion that the 80th section applies, whether the money is deposited under the earlier or the subsequent clauses, the exception in that section appearing to me to remove whatever doubt there might otherwise have been on the point. Mr. *Dax's* award being out of the way, there is, in my opinion, nothing to take away the right of the landowner to receive these costs." Now, I am bound by that authority; and I am exceedingly glad that I am bound by it, because it is a most reasonable construction of the Act of Parliament; and, in fact, the only reasonable construction that could be put upon it. I am, therefore, of opinion that upon every principle—or, in the words of Lord Justice *Knight Bruce*, upon principle, precedent, propriety, and substantial justice—this railway company were bound to pay the landowner the whole of these costs. I think it is a very shabby proceeding on their part to object to it, and therefore I shall make an order in the terms of the prayer of the Petition; and the company must also pay the costs of the Petition.

Solicitors: Messrs. *Cunliffe & Beaumont;* Messrs. *Field, Roscoe, & Co.*

V.-C. M.

1871

July 14.

In re KERRISON'S TRUSTS.

Voluntary Settlement—Trust for Maintenance—Accumulated Income—Right of Father who has maintained his Children to unapplied Fund for Maintenance.

The doctrine that where there is a fund subject to a trust for the maintenance of children, and the children are maintained by their father without any resort to the fund, the father is entitled to be recouped out of the accumulated income, only applies where the trust for maintenance is contained in an ante-nuptial marriage settlement which has a basis of contract to support it.

Therefore, where a father provided a fund of which he made a voluntary settlement after marriage upon his wife and children, and created a discretionary trust for maintenance of the children out of the income of the fund, and afterwards maintained them himself without calling for any contribution from the income of the fund:—

Held, that he, and consequently that his trustee in bankruptcy, was not entitled to receive any portion of the accumulations of the income which might have been so applied.

By an indenture dated the 12th of September, 1860, *Roger Allday Kerrison* conveyed his real estates in the county of *Norfolk* to two trustees by way of mortgage to secure £15,000, and by a post-nuptial settlement of the same date made between *R. A. Kerrison* and the same trustees, the trustees were authorized to allow the £15,000 to remain in its then state of investment, or to raise it and invest it in other ways, and to pay the income thereof to *Adelaide Thorpe Kerrison*, the wife of *R. A. Kerrison*, for her separate use, without power of anticipation, for her life, and after her death to stand possessed of the said trust premises, and income, in trust for all or any of the children of the marriage of the said *R. A. Kerrison* and *A. T. Kerrison* as she should by deed or will appoint, and in default of appointment for the children equally as therein mentioned. And by the settlement it was declared as follows:—

"That the said trustees or trustee shall, after the decease of the said *Adelaide Thorpe Kerrison*, apply the whole or such part as the said trustees or trustee shall think fit of the income of the share to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared for and towards his or her maintenance or education, and may either themselves or

himself so apply the same, or may pay the same to the said *Roger Allday Kerrison* or the guardian or guardians of each child for the purpose aforesaid, without seeing to the application thereof; and in case of payment to the said *Roger Allday Kerrison* without reference to his ability to maintain his children, and during suspense of absolute vesting, accumulate the residue thereof (if any) in the way of compound interest by investing the same, and the resulting income and produce thereof, from time to time in or upon any such stocks, funds, shares, or securities as are heretofore mentioned, for the benefit of the persons who, under the trusts herein contained, shall become entitled to the principal from which the same respectively shall have proceeded, with power for the said trustees or trustee to resort to the accumulation of any preceding year or years, and to apply the same as to them or him shall seem meet towards the maintenance and education of the child who shall for the time being be presumptively entitled to the same respectively."

Adelaide Thorpe Kerrison died on the 13th of January, 1861, without having exercised the power of appointment given her in the settlement, and the first half-year's interest on the settled fund had not become payable at the time of her death. There were five children of the marriage then living, of whom two were still under twenty-one, and one other child had died under twenty-one.

At the date of the settlement Mr. *Kerrison*, the settlor, was a gentleman of large fortune, and had no debts which could in any way affect the validity of the settlement, and notwithstanding the settlement he continued to maintain his children without calling upon the trustees to provide anything for their maintenance or education, and nothing was in fact paid by them for the purpose.

Some time after the date of the settlement, Mr. *Kerrison*, the settlor, became a partner with the late Sir *R. J. Harvey Harvey* in a bank at *Norwich*, called "*Harvey & Hudson's Bank*." In the year 1870 the bank became involved, by the acts of Sir *R. J. Harvey*, in ruinous liabilities, and on the 16th of July, 1870, Mr. *Kerrison* was obliged, in consequence of the failure of the bank, and liabilities which had fallen upon him as surety for Sir *R. J. Harvey*, to file a declaration of insolvency in the *Norwich* County Court, and by an order of the 22nd of July, 1870, he was adjudi-

V.-C. M. 1871 *In re* KERRISON'S TRUSTS.

cated a bankrupt, and on the 3rd of August, 1870, *Elijah Crosier Bailey* was appointed a trustee of his property.

The accumulations of income on the £15,000 from the death of Mrs. *Kerrison* to the date of the petition of insolvency amounted to £4111 19*s.* 10*d.*, and had been paid into Court by the surviving trustee of the settlement. The present Petition was by the trustee and the beneficiaries, and asked to have the fund distributed in certain ascertained proportions, on the assumption that it had become the absolute property of the children of the marriage. The only question was as to the right to this fund as between the children and the trustee in the bankruptcy, who had been served with the Petition.

Mr. *Glasse*, Q.C., and Mr. *Bird*, for the Petitioners :—

The clause providing for maintenance and education, though in form a trust, is in effect only a power, it being entirely optional with the trustees whether they carry it into effect. The doctrine that a father by maintaining his children without requiring a contribution out of a fund held by trustees upon trust for their maintenance, acquires a right to the accumulated income which might have been so applied, has place only in the case of antenuptial marriage settlements, and rests entirely upon the ground of contract. This was the case in *Stocken* v. *Stocken* (1), which will probably be cited as an authority in this case, and in *Ransome* v. *Burgess* (2). The doctrine is not in any case looked upon with favour, and will not be extended to voluntary settlements.

Mr. *Bristowe*, Q.C., and Mr. *Cozens-Hardy*, for the trustee in bankruptcy :—

This is clearly a trust for maintenance, and not a mere power; and the father having maintained the children would be entitled to receive out of the fund in Court such a sum as the trustees in their discretion might have applied in the maintenance of the children, and the trustee in bankruptcy is now entitled to take for the benefit of the creditors whatever Mr. *Kerrison* could have demanded. The only difference between this case and *Stocken* v. *Stocken* is, that this is a voluntary settlement, and it is im-

(1) 4 My. & Cr. 95; 4 Sim. 152. (2) Law Rep. 3 Eq. 773.

possible to distinguish in principle between the two cases on that ground. *Ransome* v. *Burgess* (1) is exactly in point. Moreover, the trust to accumulate does not arise till the trustees have exercised their discretion to apply part of the income for maintenance. It will, at all events, be proper to direct an inquiry as to what proportion of the income ought to have been so applied. The distinction drawn in all the cases is between a trust and a power, as in *Thompson* v. *Griffin* (2), and not between voluntary and marriage settlements.

SIR R. MALINS, V.C., after stating the facts, continued:—

If this were a case of an ante-nuptial settlement, and therefore having its basis in contract, and where probably money of the wife would also be put into settlement, the case would have been completely settled by authority; because it has been treated as settled law, from *Mundy* v. *Earl Howe* (3) downwards—contrary, in my opinion, as well as in expressed opinions of Lord *Cottenham* and Vice-Chancellor *Kindersley*, to sound principle—that where there is a trust for maintenance in a settlement made upon marriage, and the father has maintained the children without calling for contribution from the fund, he is in the position of a purchaser of so much of the fund as it would have been proper to apply towards maintenance. The construction put upon the trust is, that it constitutes a contract which entitles the father to claim the fund, though no demand may have been made by him for contribution from it. These decisions are, in my opinion, most unreasonable, but I should have followed them in a case of a settlement upon marriage. There is, however, no case where the doctrine has been held to apply, except where the trust for maintenance is contained in an ante-nuptial settlement, and where, consequently, it can be supported by the marriage contract. The question, therefore, is still open in the case of a purely voluntary settlement like the present.

Now, in such a case there is nothing in the way of contract, for a man cannot make a contract with himself. And the object of the settlement is entirely different from that of a settlement upon

(1) Law Rep. 3 Eq. 773. (2) Cr. & Ph. 317.
(3) 4 Bro. C. C. 223.

V.-C. M. 1871 *In re* KERRISON'S TRUSTS.

marriage. Here a man of large means desires to set apart a fund which may be applied for the benefit of his family. He therefore places it in the hands of trustees, and directs them to apply such part as they shall think fit for the maintenance of his children. Then from the time of making the settlement for a period of nine years, there is no application by him for any portion of the income. He might have required it to be paid, but he preferred to let it accumulate, and I must conclude that he only intended to apply for a contribution towards the maintenance of his children in case of some unforeseen necessity, and that the original £15,000, and all such accumulations as he did not require, were meant to be treated as the settlement fund. He intended to have the fund ready to be applied if he required it, but if not, that it should accumulate for the benefit of his wife and children. It is clear that he did not intend to benefit himself, or he would have given himself a life interest.

Therefore, holding, as I must, that the decisions beginning with *Mundy* v. *Earl Howe* (1) proceed solely on the ground of the contract created by the marriage settlement, I think they have no application to the present case, and that the settlement fund consists over and above the £15,000 of all the accumulations. The order will therefore be as prayed, but the trustee will have his costs out of the estate.

Solicitors: Messrs. *Clarke, Woodcock, & Ryland;* Messrs. *Sharpe, Parkers, & Co.*

(1) 4 Bro. C. C. 223.

GIMBLETT *v.* PURTON.

V.-C. M.
1871
July 15.

Gift to Children at Twenty-one—Class ascertained upon eldest attaining Twenty-one.

A testatrix gave the residue of her personal estate to trustees, to divide the same equally among such of her grandchildren as should attain the age of twenty-one, with power to apply the interest of the presumptive shares of such grandchildren towards their maintenance and education:—

Held, that those grandchildren only were entitled to a share of the property who were alive when the eldest attained twenty-one, and that after-born children were excluded.

Bateman v. *Gray* (1) and *Iredell* v. *Iredell* (2), observed upon.

20 Eq 648

ELIZABETH GIMBLETT made her will in 1859, and thereby gave all her real estate, and all the rest and residue of her personal estate, to trustees, upon trust to sell and convert into money all such parts of her estate as should not consist of money. And she directed as follows: "That the trustees or trustee for the time being of this my will shall stand possessed of the moneys to arise thereby, and of my ready moneys, upon trust to divide the said principal moneys unto and among such of my grandchildren as shall attain the age of twenty-one years equally, share and share alike, such children to have a vested interest at twenty-one." And the will contained the following declaration: "That it shall be lawful for the trustees and trustee for the time being, if they or he shall think fit so to do, during the minority of any of my grandchildren, to apply the interest of the presumptive share of the same child or children in the said principal moneys (notwithstanding their father may be able to maintain and educate them) towards their maintenance and education."

The testatrix died in 1861. She had one son, who had at that period four children, all of whom were infants. The suit was instituted to administer her estate. After the death of the testatrix her son married a second wife, by whom he had two children.

The suit came on in July, 1870, upon further consideration, and the cause being set down as a short cause, a declaration was made that the six grandchildren of the testatrix, and any children of the testatrix's son who should be afterwards born, and should

(1) Law Rep. 6 Eq. 215. (2) 25 Beav. 485.

V.-C. M. 1871

GIMBLETT v. PURTON.

attain the age of twenty-one, would be equally entitled to the residuary property of the testatrix.

A petition of rehearing was now presented by the eldest grandson of the testatrix, who had attained the age of twenty-one years, stating that he was advised that the decree on further consideration was erroneous, and that, according to the true construction of the will, no grandchild of the testatrix born after the eldest attained the age of twenty-one years would be entitled to a share in the estate.

Mr. *Cotton*, Q.C., and Mr. *Speed*, in support of the petition of rehearing:—

The question in this case has been settled definitively by many decisions since the time of Lord *Thurlow*, who decided in *Andrews* v. *Partington* (1) that where there is a bequest to all the children of a person to be paid at twenty-one, without any previous life estate, the fund is divisible when the eldest child attains twenty-one, and the division shall be among those *in esse*, to the exclusion of after-born children. In *Gillman* v. *Daunt* (2) the present Lord Chancellor, when Vice-Chancellor, decided in the same way, that in a bequest to such of the children of *A.* as should attain twenty-one, no child born after the eldest attained twenty-one was entitled to a share in the fund. *Hoste* v. *Pratt* (3) is a decision in conformity with this rule, notwithstanding that there was a direction for maintenance.

Mr. *Glasse*, Q.C., and Mr. *Roberts*, for the trustees.

Mr. *Pearson*, Q.C., and Mr. *C. H. Turner*, in support of the original decree:—

This is a gift to such of the grandchildren as shall attain twenty-one equally, and consequently there can be no distribution of the fund until all the children are ascertained, and this cannot be the case during the life of the father, who may have other children than the six now alive. In *Andrews* v. *Partington*, Lord *Thurlow* expressed his surprise that a contrary decision had been arrived at, as there was no greater inconvenience in the case of a

(1) 3 Bro. C. C. 401, 404. (2) 3 K. & J. 48.
(3) 3 Ves. 730.

devise than in that of a marriage settlement, where no one doubted that the same expression included all the children. The rule has been departed from in cases where there was a direction for maintenance. *Mainwaring* v. *Beevor* (1) was decided on that ground, and after-born children were held to be entitled to share. So in *Mills* v. *Norris* (2) children without restriction were let in. In *Iredell* v. *Iredell* (3) the Master of the Rolls held that the class was not to be ascertained upon the first of the class attaining twenty-one, in consequence of the will containing a power of maintenance and advancement, whether the children should or should not have attained twenty-one; and His Lordship came to a similar decision in *Bateman* v. *Gray* (4), where the gift to all the children of *A.*, "now or hereafter to be born, who shall attain the age of twenty-one," was followed by a power of advancement out of the vested or presumptive shares of any object of the gift. In that decision his Lordship reversed a previous decree made by himself upon a petition of rehearing. In this case there is a power of maintenance during the minority of the grandchildren out of the interest of the presumptive shares of the children, which will enable the Court to follow the later decisions, and thereby prevent the hardship which would be done to after-born children if those only who are now *in esse* should be entitled to take.

SIR R. MALINS, V.C.:—

This is a petition of rehearing, on the ground that a decree made by me in the cause as a short cause, and without discussion, contained an erroneous declaration of right. I am of opinion that it does contain an erroneous declaration, and I never should have made it if my attention had been drawn to the terms of the will.

The testatrix had an only son, who seems to have been amply provided for, and by her will she gave the residue of her property to trustees to sell and divide the proceeds between such of her grandchildren as should attain the age of twenty-one, equally, such children to have a vested interest at twenty-one. The eldest grandchild has now attained the age of twenty-one, and the question is, whether the six grandchildren, who are now *in esse*, are to

(1) 8 Hare, 44.
(2) 5 Ves. 335.
(3) 25 Beav. 485.
(4) Law Rep. 6 Eq. 215.

V.-C. M. 1871 GIMBLETT v. PURTON.

take each of them a share equal to the number of children now living, or whether any children who may hereafter be born are to have a share of the property?

This question depends upon a rule of law which has been settled ever since the case of *Andrews* v. *Partington* (1), that when there is a gift to a class, without any previous life estate, to be divided at twenty-one, then, when the eldest attains twenty-one, the maximum number of those who are to take is to be ascertained, and the after-born children are excluded. I confess that, when I was a student at law, it struck me as unconscionable that the class of persons to take in cases of this nature should be ascertained at a particular period, and that those who came into existence after that period should be excluded; but experience has shewn me the sound sense of the rule, because the object of the law is to make property vest as early as possible, so that the persons to whom it is given may know what they have to expect, and make the fund available at the earliest period. It appears that the father of these children is now of the age of fifty, so that, according to the existing declaration, the son who has attained twenty-one would not have any of the property so long as his father is alive, since it is not impossible or even improbable that he may have other children. There is no prior life estate given by this will, and the rule established in such cases has never been departed from, and ought not, in my opinion, to be frittered down by such a decision as that in *Bateman* v. *Gray* (2), where the rule is evaded, because there was a power of advancement to children out of vested shares. So again in *Iredell* v. *Iredell* (3) the Master of the Rolls decided that the class was not to be ascertained on the first of the class attaining twenty-one, in consequence of the clause authorizing maintenance and advancement, whether the child should or should not attain twenty-one. In the present case there is a power of maintenance during the minority of the children out of the interest of their presumptive shares; but there is no ground for construing the clause to extend beyond the time of the children attaining twenty-one, because their shares would no longer be presumptive shares. Therefore there is no such excuse for departing from the

(1) 3 Bro. C. C. 401. (2) Law Rep. 6 Eq. 215.
(3) 25 Beav. 485.

rule; but even if there were a clause for advancement similar to that which is found in *Bateman* v. *Gray* (1), I should have declined to follow the decision of the Master of the Rolls in that case, as it tends to throw a doubt upon a rule which is as well settled as any rule of interpretation in the Courts. I need not advert to all the cases cited. It is sufficient to allude to the fact, that the rule has been established in many cases, and the inconvenience of making the parties wait until there is no possibility of an increase in the number of the class is undoubted. It is a rule of convenience, and one that best suits the interests of society, and it is one that I shall adhere to as a cardinal rule of law.

Here there are six children, five of whom are minors. Of course the shares of the five younger children are only presumptive shares until they attain twenty-one years of age, when they become vested. But suppose you were to trust to this power of advancement, how absurd it would be that the young man who has now attained twenty-one should have to submit to apply to the compassion of the trustees for any advancement they might think fit to make him out of the property. They might refuse to give him a penny upon any frivolous ground.

There being at present six children, the eldest child has now ascertained his minimum share, and if any of the other five should die without attaining twenty-one, he will become entitled to a part of any share which may fall in, equally with the surviving children. These are the clear and settled rules, and I have no intention to depart from them.

The declaration will therefore be, that the grandchildren of the testatrix living at the time of her death, or born before the eldest attained twenty-one, are entitled to take equally her residuary personal estate, provided they attain the age of twenty-one; and that no child born after the eldest attained twenty-one will be entitled to any share.

Solicitor for the Plaintiffs and some of the Defendants: Mr. *J. Turner.*

Solicitors for the Grandchild who had attained twenty-one: Messrs. *Taylor, Hoare, & Taylor.*

(1) Law Rep. 6 Eq. 215.

V.-C. M.

1871

July 19.

NEWILL *v.* NEWILL.

Will—Bequest to A. and her Children.

A testator gave and bequeathed all his real and personal estate to his wife for the use and benefit of herself and of all his children, whether born of his former wife or such as might be born of his then present wife:—

Held, that the wife was entitled to an estate for life, with remainder to the children as joint tenants.

Reversed by L. C. & R. 7 Ch. 253.

HENRY NEWILL, late of the *Madras* Civil Service, made his will, dated the 19th of October, 1863, in the following words: "I give and bequeath unto my wife, *Anna Elizabeth Newill*, for the use and benefit of herself and of all my children, whether born of my former wife or such as may be born of my present wife, all my property of every description, real and personal, whether in possession, reversion, remainder, or expectancy, at the time of my decease; and I appoint the said *Anna E. Newill* executrix of this my will, together with *Joseph Newill*, my father (or, in case of his failing to act, my brother, *R. D. Newill*, in his stead); also *Hudleston Stokes* and *Charles Gilbert Master*, as executors."

The testator died on the 25th of April, 1869, leaving six children by a former wife and two children by *Anna Elizabeth Newill*. One child had died since the institution of the suit. The personal estate realised by the executors amounted to about £6000, and the testator was not entitled to any real estate.

The testator's widow and children were stated to be entitled to annuities of various amounts, payable out of the *Madras Civil Service Pension Fund*, but the widow, having since married, had lost a portion of her pension.

The suit was instituted for the purpose of having the trusts of the will carried into execution, and for the administration of the estate.

Mr. *Pearson*, Q.C., and Mr. *Holmes*, for the Plaintiffs, the children of the first marriage:—

In this case the words of the will are short and clear. The property is given to the wife of the testator for the use and benefit

of herself and of all his children. The meaning of these words can only be effectuated by the wife and children taking concurrently. Similar words were used in *De Witte* v. *De Witte* (1). The residue was there given in trust for the daughter of the testator and her children; and Vice-Chancellor *Shadwell* held that the daughter and her children were entitled to the residue jointly. The case of *Bustard* v. *Saunders* (2) was precisely the same. A sum of money was directed to be secured for the benefit of a married woman and her children, and the Master of the Rolls held that they took as joint tenants. *Bibby* v. *Thompson* (3) is perhaps more strongly in favour of the same view; for there the residue was given to the widow to be held "for her own use and benefit, and that of our infant daughter;" and it was decided that this was not a discretionary trust, but that the widow and child were equally entitled. Then, on the question of intention, this testator had children by a former wife, who required support, and his second wife might marry again, as she has done in fact. It is therefore probable that the testator's intention was to make what provision he could for his former children, independently of their step-mother.

Mr. *Marcy*, for the first Defendant, the guardian of the infant children, supported the arguments of the Plaintiffs.

Mr. *Glasse*, Q.C., and Mr. *Rogers*, for the widow:—

We admit that at one period the decisions were in favour of the view contended for by the Plaintiffs, but the current of recent authorities has been entirely adverse to that view; and in cases where the words have been similar to those contained in this will, the decisions have gone in support of our contention, that the widow takes an estate for life, with remainder to the children as joint tenants. This was the decision in *Audsley* v. *Horn* (4), where the bequest was to the testator's granddaughter and her children. There the Master of the Rolls stated the fact that in two previous cases, viz., *Dawson* v. *Bourne* (5) and *Jeffery* v. *De Vitre* (6), he

(1) 11 Sim. 41.
(2) 7 Beav. 92.
(3) 32 Ibid. 647.
(4) 26 Beav. 195.
(5) 16 Ibid. 29.
(6) 24 Ibid. 296.

4 Jur. N.S. 12 67

V.-C. M. 1871 NEWILL v. NEWILL.

had adopted the same view. In the latter case, the gift was to a married woman for the benefit of herself and her children. The decision in *Audsley* v. *Horn* was affirmed on appeal (1). Then, in *Ward* v. *Grey* (2), a bequest to *A.* and her children was held to go to *A.* for life, and afterwards to her children. This was also the decision in *Crockett* v. *Crockett* (3). In *Armstrong* v. *Armstrong* (4) Lord Justice *James*, then Vice-Chancellor, expressed a similar view, though it was unnecessary to decide the question; and Vice-Chancellor *Wickens*, in a recent case of *In re Owens* (5), decided in conformity with what appears now to be the settled rule, that, where both a parent and his children are objects of a bequest, the Court will construe the limitation as a gift to the parent for life, with remainder to the children; and there can be no doubt that this rule will, in most cases, effectuate the intention of the testator.

Mr. *Pearson*, in reply, cited *Mason* v. *Clarke* (6).

SIR R. MALINS, V.C.:—

The question in this case is a mere question of intention. The testator was a gentleman of education and position, holding a high office in the Government of *India*, and the will is made in very few words. It is perfectly clear that the property is to go for the benefit of the wife and the testator's children, and this will be the case whether the wife takes concurrently with the children or whether she takes for life, and after her decease it goes to the children, because it all goes amongst the wife and children. But it makes a material difference to the wife whether she is tenant for life of the whole, with remainder to the children, or whether she is to take concurrently with them. In the present case I understand the property to be between £6000 and £7000. There are seven surviving children, and as the whole of the children take concurrently, they undoubtedly take as joint tenants. That is not disputed; one has died since the institution of the suit, and so

(1) 1 D. F. & J. 226.
(2) 26 Beav. 485.
(3) 2 Ph. 553.
(4) Law Rep. 7 Eq. 518.
(5) Ibid. 12 Eq. 316.
(6) 17 Beav. 126.

far that has increased the shares of the survivors. If the wife and children take concurrently, the wife takes no more than the children. It is very true that, as the widow of a civil servant of the Government, she also became entitled to a pension of £300 a year, half of which she has lost by marrying her present husband, Mr. *Saul*.

If I were to consider the case apart from all the authorities (for there is a great difference of opinion amongst the learned Judges who have considered this subject), and take that to be the rule which alone ought to guide the Court, namely, what was the intention of the testator, then I ask, if a man says, "I give all my property to my wife, for the benefit of herself and my children," what must be his presumable intention? Does he mean her to be tenant for life, and that the property is to go to her children afterwards, or does he mean that the wife and children are all to take concurrently? Now I confess, considering that a man's primary duty is to take care of his wife, not only for her own sake but for the sake of her children, and to leave her with a provision which would enable her to maintain his family in the position of respectability which he has himself held, I should conclude that his intention must have been that the wife and children should not take concurrently, but that the wife should have it all while she lived, and that after her death it should go to her children, which was the manner in which, in my opinion, this testator intended his property to go.

But this question has been the subject of very frequent judicial decision, and I am hampered in this case by those judicial decisions, which are of a very contrary character. The decision of Vice-Chancellor *Shadwell*, in the case of *De Witte* v. *De Witte* (1), has been cited on behalf of the children. The Vice-Chancellor was a Judge most conversant with the construction of wills and written documents. The bequest in that case cannot in substance be distinguished from this, except upon the ground that it is there given to trustees for the benefit of the wife and children. Here it is given to the wife herself. I am not disposed to think that that makes any material difference. Apart from that, the cases

(1) 11 Sim. 41.

V.-C. M. 1871 NEWILL v. NEWILL.

are not distinguishable. Sir *L. Shadwell* decided that the wife and children took concurrently. So it was decided in *Bustard* v. *Saunders* (1), also a case undistinguishable from the present.

After that comes a series of cases. It is, no doubt, true that Lord *Cottenham*, in *Crockett* v. *Crockett* (2), appears to recognise *De Witte* v. *De Witte* (3) as a good authority, because he states it to be his opinion in that case that, if the wife and children take all that is given to them in this form, they take it concurrently; but in the case which he had to deal with, *Crockett* v. *Crockett*, in which he overruled the judgment of a very eminent Judge, Sir *J. Wigram*, the words were these: "Be it known that this my last desire is, that all and every part of my property shall be at the disposal of my most true and lawful wife *Caroline Crockett*, for herself and children, in the event of any unforeseen accident happening to myself, which God forbid; and I recommend the arrangement of all my affairs to my friend *J. Gore*." There the property was all to be at the disposal of his wife, for herself and children. That is a very strong case for saying that the wife is to dispose of it as she thinks proper for the benefit of herself and children; and that certainly enabled him to say that she herself would have it for life, with remainder to her children.

Since that, there have been many reported cases. One of them is *Ward* v. *Grey* (4), where the gift was to the mother and her children. In that case the present Master of the Rolls held that the mother took for life, with remainder to her children. In *Audsley* v. *Horn* (5) the same construction was put upon a similar will by the same learned Judge. *Jeffery* v. *De Vitre* (6) is a decision to the same effect. In that case there was a similar gift, and it was held that the mother took for life with remainder to the children. After that, there were several decisions of the Master of the Rolls, all in the same direction. The case of *Bibby* v. *Thompson* (7) is precisely the same. There the Master of the Rolls originally decided in conformity with what he had previously decided, namely, that the

(1) 7 Beav. 92.
(2) 2 Ph. 553.
(3) 11 Sim. 41.
(4) 26 Beav. 485.
(5) Ibid. 195.
(6) 24 Ibid. 296.
(7) 32 Beav. 647.

mother took for life with remainder to her children; but, upon subsequent consideration, he came to the conclusion that he would follow *De Witte* v. *De Witte* (1), and that class of cases, and therefore, in fact, reversed his own decision. Did the Master of the Rolls correctly lay down the law in the earlier decisions, or in the last?

There was the case of *Armstrong* v. *Armstrong* (2), before Vice-Chancellor *James*, which, it is very true, did not call for a decision, because the mother was dead. If she took concurrently with her children, then the children being survivors of a class, and being joint tenants, took all the property; but if she were tenant for life, with remainder to the children, they were equally entitled. There was, therefore, no ground for any decision whatever; but the case was elaborately argued before Vice-Chancellor *James*, and he expressed his opinion upon it. He says: "If they take as joint tenants, it becomes immaterial to consider whether the gift was a gift to the wife for life, with remainder to the children, or whether it was a gift to the wife and children equally. I confess the strong inclination of my opinion would be to declare it a gift to the wife for life, with remainder to the children, but I do not think it necessary to determine that question." It was wholly unnecessary to determine that, because in either way the children were absolutely entitled to the whole fund. What was the gift there? The testator gave the property in these terms—to his wife absolutely for the benefit of herself and children. Here it is given to the wife "for the benefit of herself and my children." This is the opinion of a Vice-Chancellor, now a Judge of the Court of Appeal, in which he thought the proper construction was, that, according to all probability as to what the intention of the testator was, the mother was meant to be tenant for life, with remainder to her children.

There has been also a case before Vice-Chancellor *Wickens*: *In re Owen's Trust* (3). The gift there was to a mother and her children, and the Vice-Chancellor held it to be a gift for life, with remainder to the children.

(1) 11 Sim. 41. (2) Law Rep. 8 Eq. 518.
(3) Law Rep. 12 Eq. 316.

V.-C. M. 1871 NEWILL v. NEWILL.

Therefore, upon all these grounds, I come to the conclusion that the current of authorities has now run completely in the direction which effectuates the intention of the testator, namely, that when a man gives to his wife for the benefit of herself and her children, he does not mean to put her on a mere equality with her children, but he means that she is to take for life, with remainder to her children. That is the construction which I put upon this will. Of course, in coming to that conclusion, I follow all the other decisions of the Master of the Rolls except *Bibby* v. *Thompson* (1).

The declaration will be that the mother is tenant for life, with remainder to all the children of the testator as joint tenants. There must also be an order to pay the income to the widow for life.

Solicitors for the Plaintiff: Messrs. *Sharp & Ullithorne.*
Solicitors for the Defendants: Messrs. *Clayton & Sons.*

V.-C. M. 1871 *July* 22.

TURNER *v.* COLLINS.

Costs—Solicitor and Client—Practice of Court—Fiduciary relation between Parties—Fund applicable to the Payment of Costs.

Where an unsuccessful party to a suit has been ordered to pay costs, it is not the practice of the Court to direct such costs to be taxed as between solicitor and client, except where a fiduciary relation exists between the parties or where there is something in the nature of scandal, as where gross charges of fraud have been made and not sustained; but the Court may direct an unsuccessful party to pay the costs of a trustee as between solicitor and client, whether there is or not any fund out of which they may be paid.

THIS was a suit instituted to rectify a settlement executed in March, 1855, under which the Plaintiff, who was entitled to considerable property, conferred certain benefits on his father, his step-mother, and his half-sister; by excluding part of the property comprised therein, and striking out a power of appointment vested in the father, on the ground that the Plaintiff had executed it

(1) 32 Beav. 647.

without sufficient legal advice, that he was ignorant of its effect, and that it did not carry out his intentions. The bill also asked the direction of the Court in reference to some other questions.

The suit occupied several days in hearing, and on the 8th of July the Vice-Chancellor gave judgment dismissing the bill, so far as it sought to rectify the settlement. His Honour having expressed a strong opinion with reference both to the facts as they appeared at the hearing and to the long delay in instituting the suit, that the litigation was unjustifiable, said that he desired, if possible, to make the costs a complete indemnity to the Defendants, and that if any authority could be produced for dismissing a bill "with costs as between solicitor and client," he would follow it, and make a decree accordingly. He would, therefore, allow the case to be mentioned again on that question.

The suit was now mentioned.

Mr. *Fry*, Q.C., and Mr. *Chitty*, for the persons beneficially interested in maintaining the settlement:—

It is quite settled that the Court has, in all cases, complete jurisdiction over costs, and can always give them as between solicitor and client. The point was raised recently in *Mordue* v. *Palmer* (1), and the Lords Justices upheld an award by an arbitrator giving costs in that manner, expressly on the ground of the inherent jurisdiction. In *Forester* v. *Read* (2) they also carried out the same view. The Court has always exercised complete discretion in directing how costs were to be paid, as in *Edenborough* v. *Archbishop of Canterbury* (3), where costs were allowed to the Archbishop as between solicitor and client, and in *Attorney-General* v. *Compton* (4), where they were given to the relators. A trustee is even allowed them when unsuccessful: *Poole* v. *Pass* (5).

Mr. *Glasse*, Q.C., who appeared for the trustees, referred to Lord *Eldon's* decision in *Dungey* v. *Angove* (6).

(1) Law Rep. 6 Ch. 22.
(2) Ibid. 40.
(3) 2 Russ. 93.
(4) 1 Y. & C. Ch. 417.
(5) 1 Beav. 600.
(6) 2 Ves. 304, 313.

V.-C. M. 1871 TURNER v. COLLINS.

Mr. *Cole*, Q.C., and Mr. *Haynes*, for the Plaintiff, were not called upon.

SIR R. MALINS, V.C. :—

I am sorry to come to the conclusion in this case that it is not in my power to give the Defendants beneficially interested their costs as between solicitor and client. When the case was heard before me, I expressed a strong desire to do so, feeling that it was one in which I ought, if possible, to make the costs a complete indemnity. But I am now satisfied that it is not the course of the Court to make such an order in dismissing a bill, except where the parties are in a fiduciary position, or where there is something in the nature of scandal, such as gross charges of fraud which are not sustained. In the case of *Jenner* v. *Jenner* (1), which was very much of the same kind as the one now before me, nothing could be stronger than the opinion of the Lord Chancellor as to the unjustifiable nature of the litigation, for he concludes his judgment by saying: "The Plaintiff's attempt now to impeach this settlement seems to me highly discreditable to him; and, for the peace and honour of families, I trust that it is not likely to be imitated." Yet, in that case, I find that the costs were only given as between party and party.

Now, as to the cases cited as authorities: *Mordue* v. *Palmer* (2) was a case where all matters in difference between the parties to a cause, including the costs, had been referred to an arbitrator, and he made an award giving the costs as between solicitor and client, and it was objected that the arbitrator, unless specially authorized, had no power so to direct; but the Lords Justices decided that the nature of the suit and the reference gave him jurisdiction so to determine, and on that ground they refused to set aside the award. This is apparent from what the Lord Justice *James* says: "Not only the questions in the suit were referred to him, but also the costs of the suit and of the award and reference. He has come to the conclusion, having regard to the fiduciary relation between the parties, that the costs should be paid as between solicitor and client. It is not our duty to express any opinion

(1) 2 D. F. & J. 359. (2) Law Rep. 6 Ch. 22.

upon this conclusion, except that he had jurisdiction to make it, and that his decision is final."

It is clear, therefore, that the fiduciary relation was the ground on which they held that he had jurisdiction. In *Forester* v. *Read* (1) a distinction was made between the parts of the case which were scandalous and those which were not so, a distinction which would have been unnecessary if costs were in all cases given as between solicitor and client. As regards *Edenborough* v. *Archbishop of Canterbury* (2), it is true that the Archbishop was allowed costs as between solicitor and client, and it is also true that he was not, strictly speaking, a trustee; but the case is put on the ground of his being in an official position, and defending the suit in a public capacity, and on that ground the costs were allowed him as between solicitor and client. The same remarks apply to *Attorney-General* v. *Compton* (3). *Poole* v. *Pass* (4) was a case where a trustee was allowed his costs as between solicitor and client, though the suit had been caused by his maintaining a contention which the Court held wrong in law. In my opinion, I can only dismiss a suit with costs as regards beneficiaries as between party and party. As to the trustees, I shall direct that their costs be paid as between solicitor and client, unless the Plaintiff's counsel can satisfy me that that would be wrong.

Mr. *Cole*, Q.C., and Mr. *Haynes*, for the Plaintiff:—

The only power the Court has to direct that trustees shall have solicitor and client costs is where there is a fund out of which costs can be paid. All, therefore, that can be done here is to direct the Plaintiff to pay the party and party costs of the trustees, and that the difference between their party and party costs and solicitor and client costs be charged on the settled fund. In *Edenborough* v. *Archbishop of Canterbury*, and *Attorney-General* v. *Compton*, there was a fund applicable to the payment of costs; and in *Saunders* v. *Saunders* (5), it was laid down by Vice-Chancellor *Kindersley* that, where there is no fund, trustees can only have party and party

(1) Law Rep. 6 Ch. 40.
(2) 2 Russ. 93.
(3) 1 Y. & C. Ch. 417.
(4) 1 Beav. 600.
(5) 3 Jur. (N.S.) 727.

V.-C. M. 1871

TURNER v. COLLINS.

costs. Moreover, there is no fiduciary relation with reference to the part of the bill dismissed with costs.

Mr. *Glasse*, Q.C., and Mr. *Springall Thompson*, for the trustees.

SIR R. MALINS, V.C., without calling upon the other parties :—

This is a case of considerable importance. By virtue of a voluntary settlement of the 15th of March, 1855, certain real estate and some money in the funds became vested in trustees upon trusts for the benefit of the settlor's father and other relations. The settlement was duly executed by the son; but in the year 1869 he thought fit to institute proceedings to set it aside. I came to the conclusion that the litigation was as unjustifiable as any I have ever had before me, and dismissed the bill with costs. I have, however, been obliged to decide that, as between the father and the son, I have only power to give costs as between party and party.

Now comes the question as to the trustees. They are brought before the Court by the Plaintiff. It is admitted that they are entitled to receive costs as between solicitor and client; but Mr. *Cole* says that the Plaintiff can only be required to pay party and party costs, and that the difference must be paid out of the settled fund. If I take that course, the result will be to diminish the annual income which is payable to the father, and so in effect make him pay a large part of the costs of the suit. I am of opinion, notwithstanding the urgency with which Mr. *Cole* pressed his view upon me, that I have power to direct the costs of the trustees to be paid as between solicitor and client. If it should turn out in the present case that the Plaintiff is unable to pay the costs, they must be made good out of the fund. But I am of opinion that it is quite consistent with the rules of the Court to direct the unsuccessful party in the first instance to pay all the costs of the trustees as between solicitor and client. The point was, in fact, raised in *Edenborough* v. *Archbishop of Canterbury* (1); and Lord *Eldon* gave the Archbishop those costs expressly on the ground that, in

(1) 2 Russ. 93.

the case of a trustee, he could make such a direction. In *Poole* v. *Pass* (1) a trustee had his costs, charges, and expenses, notwithstanding that he had been the means of bringing the parties before the Court. Here, however, it is said that he should not have his full costs paid by the party who brought him before the Court. I cannot imagine any thing more unjust than that these trustees should not have their full costs. I am clearly of opinion that the Plaintiff must pay them for the performance of the duties which the institution of the suit threw upon them.

Solicitors: Messrs. *Leman, Groves, & Leman;* Messrs. *Newman, Dale, & Stretton.*

(1) 1 Beav. 600.

V.-C. B.

1871

June 30.

CHESTER *v.* CHESTER.

Charity—Mortmain—9 Geo. 2, c. 36—Impure Personalty—Charity empowered to take Money devised or bequeathed—Residuary Gift to Executors—Power to take Money and hold Land to specified Amount—Power to take Money secured on Mortgage.

1869 G. 91

By a private Act of Parliament the *Indigent Blind School* was incorporated, and empowered to have, hold, receive, and retain any sums of money paid, given, devised, or bequeathed, by any person for the charitable purposes in the Act mentioned; and also to purchase, take, or receive, and thenceforth hold and enjoy, any lands, tenements, and hereditaments, in the whole not exceeding two acres, without incurring any of the penalties or forfeitures of the Statutes of Mortmain. The surplus funds of the corporation were also permitted to be invested on mortgage, and the lands, when released or foreclosed, might be held by the corporation for a period not exceeding two years. The *Female Orphan Asylum* was incorporated by an Act containing a similar clause.

By another Act the *Deaf and Dumb Asylum* was rendered capable to obtain, acquire, hold, and retain, for the purposes of the institution, any moneys and other personal estate and property, including moneys secured by mortgage of, or charged upon, or to arise from the sale of any hereditaments; with a proviso that nothing therein contained should make valid any grant which would be void or impeachable under the 9 Geo. 2, c. 36:—

Held, that bequests of debts secured to the testator's estate by equitable mortgage of leaseholds to these charities were void.

Gifts of residue to executors in trust, with equal legacies to the executors by name:—

Held not to pass a beneficial interest in undisposed-of residue, which came to the Crown.

Further consideration.

William Mann died on the 9th of March, 1865, having by will, dated the 24th of December, 1864, bequeathed his "personal estate of every description" to his friends, *Henry Chester* and *Frederick James Chester*, their executors, administrators, and assigns, upon trust in the first place to pay thereout his just debts, funeral and testamentary expenses, and the legacy duty upon "the several legacies hereinafter mentioned," and then to retain and pay the following legacies, that was to say:—"To the said *Henry Chester*, £5000; to the said *Frederick James Chester*, £5000." Then followed several other pecuniary legacies, and finally the following:—"To the churchwardens and overseers of the parish of *St. Mary*,

Newington, in the county of *Surrey*, £2000, to be invested and applied as hereinafter mentioned: to the National Schools of the said parish of *St. Mary, Newington*, £1000; to the *Surrey Dispensary*, £1000; to the *Deaf and Dumb Asylum, Old Kent Road*, £1000; to the *Asylum for Female Orphans, Westminster Road*, £2000; to the *Society for the Propagation of the Gospel in Foreign Parts*, £1000; and to the *School for the Indigent Blind, St. George's Fields, Southwark*, £1000;" all the legacies to be free of legacy duty: and the charitable legacies to be paid to the treasurers of the several institutions. The testator directed that the £2000 so given to the churchwardens and overseers of *St. Mary, Newington*, "and any augmentation thereof under the residuary bequest hereinafter contained," should be invested in consols, and the dividend paid for the benefit of the poor of the parish, as the churchwardens and overseers should think fit. He then bequeathed the rest, residue, and remainder of his personal estate and effects "upon trust to apply the same in equal proportions among the seven last-mentioned charities (each taking one seventh part) in augmentation of their said legacies, and upon the same trusts and purposes as are hereinbefore declared with reference to such legacies." After some specific devises of real estate, he continued: "I give the whole of my freehold estates and property in the county of *Kent*, and in *Bishopsgate Street*, in the city of *London*, unto the said *Henry Chester* and *Frederick James Chester*, their heirs and assigns, for ever, as tenants in common." He also appointed the same two persons his executors.

The testator had no heir-at-law, and no next of kin. He died possessed of personal property, comprising leaseholds for years, and real estate, part of which was not devised by the will.

The bill was filed on the 1st of January, 1865, by *Henry Chester*, against *Frederick James Chester*, for administration; a decree was made on the 3rd of June, 1865; and leave to attend the proceedings was given to the Attorney-General and the charities. The debts and pecuniary legacies having been paid, the Chief Clerk, by certificate, filed the 27th of June, 1866, found as follows:—

"The Plaintiff and Defendant were proceeding to sell and dispose of the testator's leasehold estate, as directed by the said decree, but such sale was opposed by the president, vice-president,

V.-C. B. 1871 CHESTER v. CHESTER.

and members of the *School for the Indigent Blind*, on the behalf of that charity, on the ground that such charity has the privilege under two Acts of Parliament to receive, take, or enjoy any land for the benefit of the charity, and that the charity will be prejudiced if the sale be proceeded with. The parties have therefore forborne to proceed with the sale until the cause is heard on further consideration."

On the 25th of February, 1867, after an argument before the Lord Chancellor, then Vice-Chancellor *Wood*, an order was made declaring that, according to the true construction of the will, "the leasehold property in the county of *Kent* belonging to the testator, in the 4th schedule to the Chief Clerk's certificate mentioned, formed part of the residue of the personal estate." It was also declared that "the *School for the Indigent Blind* is not entitled to any share in the leasehold estates of the testator, or the proceeds thereof." It was also declared that "the residue of the testator's pure personal estate is divisible, subject to the direction hereinafter contained, in equal seventh parts amongst the following charities" (naming them). An inquiry was directed "as to how much of the personal estate of the testator consisted, at the death of the said testator, of pure personalty, and how much of personalty savouring of realty, having regard to the declarations herein contained, and what is the value thereof respectively;" and it was declared that "the pecuniary legacies to the charities failed in the proportion which the personalty savouring of realty bears to the whole personalty." An inquiry was also directed as to "how much of the residue of the personal estate is to be considered as pure personalty, and in what proportion the same is divisible among the charities in respect of their said legacies and as residuary legatees, having regard to the declarations and directions hereinbefore contained, and to the payments already made in respect of their pecuniary legacies."

By a further certificate dated the 3rd of June, 1870, the Chief Clerk found that such part of the personal estate not specifically bequeathed the particulars whereof were set forth in the 1st schedule, consisted, at the testator's death, of pure personalty to the value of £50,657 13*s.* 9*d.*; and that such parts of the personal estate the particulars whereof were set forth in the 2nd schedule

thereto consisted of personalty savouring of realty to the value of £4231 17*s.* 10*d.* He also found that owing to the amount of the costs not yet having been ascertained, the inquiry as to the amount and quality of the residue of the personal estate had been postponed.

Amongst the items comprised in the 2nd schedule was an "amount of debt due from *William Holland*, a lunatic," £750, with interest to the 9th of March, 1865, £68 17*s.* 10*d.*; making together £818 17*s.* 10*d.* This debt was secured by a mortgage, by equitable deposit with the testator, of a lease belonging to *William Holland.*

The Plaintiff *Henry Chester* died, and the first of the above charities, namely, the churchwardens and overseers of the poor of *St. Mary, Newington*, obtained leave to have the conduct of the cause, without revivor of the suit.

The questions were two, first, as to the debt secured by equitable mortgage—whether a bequest of such a debt to the charitable legatees, or some of them, would not, under their respective statutes, be lawful, the effect of which would be to increase the ratio in which the residuary bequest to the charitable legatees failed; and, secondly, whether the portion that failed went to the executors absolutely, or, as undisposed of, to the Crown.

Mr. *J. Hinde Palmer*, Q.C., and Mr. *Willoughby*, for the Churchwardens and Overseers of the Poor of *St. Mary Newington*:—

As to the debt secured by equitable mortgage, it will be contended that it is bound by declaration—not perhaps by the declaration as to the leaseholds, which may be considered to extend to them only, but by the declaration that the pecuniary legacies to the charities fail in the proportion which the impure personalty bears to the whole personalty.

If the charities, however, are still at liberty to argue the question, then we say that the churchwardens and overseers of the parish stand in a different position to that of the *Female Orphan Asylum* and the *Blind School*, as regards which an adverse decision with reference to this very class of property was made by the Master of the Rolls in *Nethersole* v. *School for the Indigent Blind* (1).

(1) Law Rep. 11 Eq. 1.

V.-C. B. 1871

CHESTER v. CHESTER.

Mr. *Cookson* (Mr. *Hughes* Q.C. with him), for the *School for the Indigent Blind:*—

The decision of the Master of the Rolls was no doubt against the claim of the school; but that decision is intended to be appealed.

The question turns upon a local and personal Act of 7 Geo. 4, c. lxviii., passed in 1826, by which the *Blind School* was incorporated, followed by another of 1 Will. 4, c. cxix, both of which are recited in a third Act of the 28 Vict. c. lxxiii (1).

If it be held that the Legislature did not intend that this corporation were to be empowered to take impure personalty when bequeathed to them, not only is the word "devised" inappropriate and unnecessary, but the whole clause is surplusage.

(1) The 1st section of the Act of 1826 is set out in the report of *Nethersole* v. *School for the Indigent Blind;* the more important words being "and that they and their successors, by the name aforesaid, shall be able and capable in law to have, hold, receive, enjoy, possess, and retain, for the ends and purposes of this Act, and in trust for the benefit of the said institution, all such sum and sums of money as have been paid, given, devised, or bequeathed, or shall at any time or times hereafter be paid, given, devised, or bequeathed, by any charitable or well disposed person or persons to and for the charitable ends and purposes in this Act mentioned; and that they and their successors, by the name aforesaid, shall and may at any time or times hereafter purchase, take, or receive, and thenceforth hold and enjoy, any lands, tenements, or hereditaments, in the whole not exceeding two acres, for any estate or interest whatsoever, for the purposes of the said charity, without incurring any of the penalties or forfeitures of the Statutes of Mortmain."

By the 3rd section of the Act of 1865 the corporation are empowered "to purchase and hold any lands, tenements, or hereditaments, without incurring any of the penalties or forfeitures of the Statutes of Mortmain;" provided that the hereditaments at any time vested in, or the property of, the corporation (except such as may from time to time be vested in them as mortgagees) shall be in their own occupation, and shall in no case exceed fifteen acres.

By the 9th section of the same Act, surplus funds of the corporation are permitted to be invested on mortgage of freeholds, or copyholds of inheritance, or leaseholds, for terms of not less than eighty years; and by the 10th section it is provided that when, in the case of hereditaments in mortgage to the corporation, the person entitled to redeem shall release the right of redemption, or it shall be foreclosed, the hereditaments may be held and retained by the corporation for not more than twenty-four months, within which period the corporation shall sell the same, and during that space shall not be liable for any penalties or forfeitures for holding and retaining the same; but if the hereditaments shall remain unsold and undisposed of at the expiration of that period the same shall be forfeited if the hereditaments exceed fifteen acres.

The construction contended for is helped by the 10th section of the Act of 1865, which is not necessarily confined to the investments permitted by clause 9. There may have been mortgages in existence before the passing of the Act.

The use of the word "devised" does away with the double disability pointed out in *Robinson* v. *Governors of London Hospital* (1) —that of testators to devise, and of the corporation to hold impure personalty.

Mr. *Horsey*, for the *Asylum for the Deaf and Dumb Poor*:—

The statute under which we claim is the 25 Vict. c. l. (2), which expressly includes moneys secured by mortgage.

Mr. *Hadley*, for the *Female Orphan Asylum*:—

The Act under which the asylum was established is the 39 & 40 Geo. 3, c. lx. (3).

The 5th section of the original Act implies that the corporation

(1) 10 Hare, 19.

(2) The 4th section of the 25 Vict. c. l., provides that "the said president, vice-presidents, treasurer, and governors shall by their corporate name be able and capable . . . to obtain, acquire, hold, and retain, for the purposes of the institution any moneys and other personal estate and property, including moneys secured by mortgage of, or charged upon, or to arise from the sale of any hereditaments: Provided, nevertheless, that nothing in this Act contained shall make valid or confer any validity on any grant or purchase which would be void or impeachable under the enactments contained in an Act of Parliament passed in the ninth year of the reign of his late Majesty, King *George* II., intituled '*An Act to restrain the Dispositions of Lands, whereby the same became inalienable*'" . . .

The limit of lands to be purchased for the purposes of the institution was declared to be fifteen acres.

(3) The language of the 1st section of the 39 & 40 Geo. 3. c. lx. is as follows:—

"And that they and their successors, by the name aforesaid, shall be able and capable in law to have, hold" . . . (in the exact terms of the clause in the case of the *Indigent Blind School*, substituting "asylum" for "institution") "and that they and their successors, by the name aforesaid, shall and may, at any time hereafter, without license in mortmain, purchase, take, or receive, hold and enjoy any lands, tenements or hereditaments, or any estate or interest arising or derived out of any lands, tenements or hereditaments, for the purposes of the said charity."

The 5th section provides that all persons in whose names any "sums of money . . . mortgages, securities for money . . . should, at the time of the passing of the Act, stand or be secured, the beneficial interest wherein should belong to the charity, should forthwith

V.-C. B. 1871 CHESTER v. CHESTER.

were thenceforth to be capable of holding mortgage securities for money.

Independently of that, the language of the 1st section, empowering the asylum to "receive" all such sums of money as have been "devised or bequeathed" by any charitable person, shews the intention of the framers of the Act to have been that the *Statute of Mortmain* should not, with regard to impure personalty, any longer affect this charity.

The decision in the *Trustees of the British Museum* v. *White* (1) gave rise to the passing of the 5 Geo. 4, c. 39, which contains words similar to them; and since the passing of that Act it is believed, though no authority is extant, that the Museum can take bequests of impure personalty.

Mr. *F. T. White*, for the *Surrey Dispensary*.

Mr. *Speed*, for the Treasurers of three of the National Schools.

Mr. *Leeson*, for a fourth.

Mr. *Phear*, for the *Society for the Propagation of the Gospel*.

Mr. *Dauney*, for the Defendant, the surviving executor:—

"The statute" of 11 Geo. 4 & 1 Will. 4 c. 40 (Lord *Cranworth's* Act) "has made no alteration in the law, except in the cases where the deceased has left next of kin. If, therefore, there are no next of kin, and no intention is disclosed on the face of the will that the executors shall be excluded from taking beneficially, they will be entitled as against the Crown:" *Williams* on Executors (2), referring to *Taylor* v. *Haygarth* (3), and *Russell* v. *Clowes* (4). He also referred to *Dacre* v. *Patrickson* (5).

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after the passing of the Act transfer and assign the same, so as that the same should be vested in the corporation.

By the 5 Geo. 4, c. v., the former statute was amended and rendered more effectual, and by sect 1 of that statute all corporations, feoffees in trust, executors, administrators, and all other trustees whatsoever, were empowered "to sell and convey to" the president, vice-presidents, treasurer, and guardians, lands not exceeding in the whole three acres.

(1) 2 S. & S. 594.
(2) 6th Ed. vol. ii. p. 1366, n. (*y*).
(3) 14 Sim. 8.
(4) 2 Coll. 648.
(5) 1 Dr. & Sm. 182.

Mr. *Hemming*, for the Attorney-General:—

Before the statute the onus was not upon the executors to shew that the gift was intended for them; and even if the statute does not apply to a case of failure of next of kin, there is enough to shew that the executors cannot take beneficially.

In this instance the executors have equal legacies given to them, which furnishes a presumption against their being meant to take the residue of the impure personalty beneficially. The words "upon trust" alone have been held to exclude a beneficial ownership: *Dacre* v. *Patrickson* (1).

They are, moreover, excluded by the form of the declaration.

Upon the other point, superfluous words are always to be found in Acts of Parliament.

The distinction between the two classes of statutes—the one prohibiting persons from alienating, and the other disabling corporations from holding, in mortmain—has been forgotten in the arguments for the charities: *Robinson* v. *Governors of London Hospital* (2). The only meaning of these enabling words is to do away with the necessity of obtaining a license to hold in mortmain.

As to money secured upon mortgage, of which the impure personalty in this case consists, not only does the word "devise" not help the charities, for it is not the correct word to use; but, in truth, the whole clause is a clause enabling charities to take, not empowering testators to give.

In the case of the *Deaf and Dumb Asylum*, sect. 4 of the Act defines the distinctions very clearly. It takes away the disability of the asylum to hold land, but provides that the statute shall remain in full force. It is only by deed enrolled six months before death that property of this kind can pass to these charitable bodies.

SIR JAMES BACON, V.C.:—

The claim of the executors cannot be seriously maintained. It is clear that they are not entitled to take beneficially.

The only question remaining for decision, under the several Acts of Parliament relating to the charities on behalf of which counsel

(1) 1 Dr. & Sm. 182. (2) 10 Hare, 19, 24.

V.-C. B. 1871 CHESTER v. CHESTER.

have appeared, is with respect to this sum of money secured on mortgage.

The important words are to be found in the 1st section of the *Blind School Act,* passed in 1826; and the statutes relating to the other charities, if not identical in terms with that Act, are governed by the same principles. The Act empowers the company to "purchase, take, or receive, and thenceforth hold and enjoy, any lands, tenements, or hereditaments, in the whole not exceeding two acres, for any estate or interest whatsoever, for the purposes of the said charity, without incurring any of the penalties or forfeitures of the Statutes of Mortmain."

But these words must be read in connection with the established law. If there had been no reference to the Statutes of Mortmain, the construction must have been the same. But here there is express reference to the Mortmain Acts, under which impure personalty cannot be left by will for the benefit of charitable institutions.

I am asked to hold that these statutes have been repealed by these Acts which have been referred to, and that by a sort of implication, and not expressly. But I think the words of the modern statutes on which reliance has been placed, namely, "without incurring any of the penalties or forfeitures of the Statutes of Mortmain," may be satisfied without any such violent interpretation. There may be instances in which powers have been given to testators to devise property which otherwise by law would not pass to charitable institutions. If such a case should be found to exist, these words have a direct application.

But then it is said, that because the Legislature has given to these bodies power to accept gifts of lands to the extent specified, I must, therefore, decide that it has *pro tanto* repealed the Mortmain Acts to the whole extent of the objects comprised in the statutes in which these words are to be found. But the case before us is the case of land held in mortgage, and consequently held for a totally different purpose than that for which lands are by these statutes contemplated to be held. A power is no doubt given to invest surplus funds of the various corporations in mortgage; but then fetters are imposed on the corporations with regard to the exercise of that power, and they are compelled to sell again within the period of two years.

If it were necessary or proper for the Court to guess at, or to talk about the intention of the Legislature, it might be worth while to consider whether the Act of Parliament under which the charity for which Mr. *Horsey* appears claims, is different in its effect from that before referred to. Here the words are, that the presidents, vice-presidents, &c., shall, by their corporate name, be able and capable to hold for the purposes of the institution, any moneys and other personal estate and property, "including moneys secured by mortgage of, or charged upon . . . any hereditaments." But that is followed by a proviso that nothing in the Act contained shall make valid any grant which would be void under the 9 Geo. 2, c. 36. So that this Act does not, any more than the other, by implication, repeal the Mortmain Acts; and, by express stipulation, it does not exclude the operation of the Act of 9 Geo. 2.

Then I am asked not to follow the decision of the Master of the Rolls in *Nethersole* v. *School for the Indigent Blind* (1). But I have as great a respect for that decision as I have for any other in that branch of the Court. If not bound by that decision, I desire to say I concur, without the slightest doubt or qualification, in all that fell from his Lordship in deciding that case.

The result will be, that the gifts to these institutions will abate in the proportions which have been worked out.

Solicitors for the *Newington* Churchwardens: Messrs. *Chester.*

Solicitors for the respective Defendants: Messrs. *Grueber & Cooper;* Mr. *B. G. Wilkinson;* Messrs. *Booth & Lane;* Messrs. *Jones, Arkcoll, & Jones;* Messrs. *Kiss & Son;* Mr. *R. Wiltshire;* Messrs. *Nicholl, Burnett, & Newman;* Mr. *W. Butler;* Messrs. *Raven & Bradley.*

(1) Law Rep. 11 Eq. 1, 3.

V.-C. B.
1871
July 1, 4.

In re LAUGHARNE RAILWAY COMPANY.

Railways Abandonment Act, 1869 (32 & 33 *Vict. c.* 114, *s.* 5)—*Winding-up—Costs of Petition for Transfer of Deposit Moneys.*

A railway having been abandoned under the *Railways Abandonment Acts*, the costs of a Petition by the depositor for the transfer out to him of the bulk of the deposit-moneys were ordered to be paid out of the general assets of the company.

By a local Act passed in 1866 (29 & 30 Vict. c. cclxxix) the *Laugharne Railway Company* was incorporated, and a sum, now represented by a sum of £4522 2*s.* 9*d.* consols, was advanced by *Albert Ricardo*, and deposited in the usual way, in the names of two of the first directors. On the 11th of May, 1870, the Board of Trade, on the application of *Ricardo*, issued a warrant for the abandonment of the railway, on the condition (*Railway Companies Act*, 1867, 30 & 31 Vict. c. 127, sect. 31, sub-sect. 3) that the deposit should be applied as part of the assets. Thereupon an order was made for the winding-up of the company; claims were sent in, and an amount of £647 19*s.* 7*d.* was allowed. One of these debts, for a sum of £134 4*s.* 11*d.*, due to Sir *Charles Fox*, had been purchased, since the winding-up order, by *Ricardo*. A claim of £357 10*s.*, though allowed against the company, had been disallowed against the deposit, as having been incurred on account of the promotion of the company (32 & 33 Vict. c. 114, s. 5). The other debts allowed against the deposit amounted to £156 4*s.* 8*d.*

Ricardo now petitioned the Court praying that out of the deposit moneys £3522 2*s.* 9*d.* stock might be transferred to him, leaving £1000 stock in Court to provide for the costs of the liquidation, and for so much of the £156 4*s.* 8*d.* as might ultimately be directed to be paid out of the deposit.

Mr. *Fry*, Q.C., and Mr. *Westlake*, for the Petitioner.

Mr. *Jackson*, for the official liquidator.

Hon. *R. Butler*, for Sir *C. Fox*, asked for his costs.

The Vice-Chancellor ordered as prayed, and directed Sir *C. Fox's* costs to be paid.

V.-C. B.
1871
In re LAUGHARNE RAILWAY CO.

July 4. The Petition being mentioned again to day,

Mr. *Fry*, and Mr. *Westlake*, asked for the Petitioner's costs:—

The fund having been advanced by the Petitioner for the benefit of the undertaking, the costs of obtaining a re-transfer ought to be repaid to him out of the funds; in other words, the Petitioner is entitled to his costs against the general assets of the company.

Mr. *Jackson*, for the liquidator, did not oppose; and asked for the liquidator's costs out of the general assets.

SIR JAMES BACON, V.C.:—

The application seems a reasonable one, and the Petitioner may take his costs out of the general assets.

The liquidator will have his costs out of the same fund.

Solicitors for all Parties: Messrs. *Ashurst, Morris, & Co.*

COLLINS *v.* COLLINS.

V.-C. B.
1871
July 4.

Will—Legacy—"Moneys in the House and out of it"—Building Shares—Sum of Consols.

Testator, after commencing his will with the words "as for my worldly goods and chattels, I bequeath them as followeth," gave several pecuniary legacies, and, amongst the rest, to his daughter *S.*, a legacy of £3000. He also bequeathed to his daughter *S.* "all things in the house remaining . . . and all moneys both in the house and out of it," and made no express residuary bequest. He appointed an executor.

At the time of his death testator had moneys in his house, at his bankers, and at a savings bank. He had also due to him arrears of a superannuation allowance, and a sum for funeral expenses from a friendly society, as to all which there was no question.

He had besides some shares in a building society, and a sum of consols standing in his own name:—

Held, that the shares and stock did not pass under the bequest of "all moneys both in the house and out of it."

ROBERT COLLINS died in 1866, having by will, dated in 1862, bequeathed as follows:—

"As for my wordly goods and chattels I bequeath them as

V.-C. B. 1871 COLLINS v. COLLINS.

followeth: First, to my son *Thomas*, £700. To my son *James*, £100. To my son *Alfred*, £100. To my son *Frederick*, £100. To my son *Arthur* £700. To my daughter *Susannah*, £3000, and if married not to be sold out of the funds without her consent. And I also bequeath to her all things in the house remaining of whatsoever kind, and all moneys both in the house and out of it, for her own use." He bequeathed another legacy, and appointed his son *Thomas* executor. By a codicil he gave additional legacies to his sons *Thomas* and *Arthur*, and in all other respects confirmed his will.

At his death he had furniture in his house, moneys in the house, a sum of £389 standing in his name to the credit of a drawing account at his bankers, and a sum standing to his credit at a savings bank. He was also entitled to £23, as arrears of a superannuation allowance from Government, and to a sum of £14 payable for his funeral expenses by a friendly society. As to these items there was no question. But he had also ten shares for £50 each in a building society, and a sum of £6886 17*s.* 6*d.* Consolidated Bank Annuities.

The bill was filed for administration, and the question now, upon further consideration, was, whether the building shares and consols went to *Susannah* under the gift of "all moneys both in the house and out of it;" or passed to his next of kin as undisposed of personalty.

Both the consols and the shares had been sold by the executor.

Mr. *Eddis*, Q.C., and Mr. *G. O. Edwards*, for the Plaintiffs, some of the next of kin:—

We say that the building shares and consols are undisposed of.

The words "worldly goods and chattels" might carry this property; but they are flexible, and must be interpreted by what follows. It is improbable that the testator meant to make his daughter *Susannah* his residuary legatee, when he had already taken £3000 out of his estate to give to her, and had given her things which he described by reference to locality. Nor should we expect to find a residuary clause in the middle of a will.

The word "moneys" is ineffective to carry stock: *Gosden* v.

Dotterill (1); *Lowe* v. *Thomas* (2); *Ogle* v. *Knipe* (3); *Larner* v. *Larner* (4).

Apart from the context, "money" does not include stock or shares in a company: *Jarman* on Wills (5).

There is not a word in the clause suggestive of residue: *Lowe* v. *Thomas* (6).

Mr. *Cracknall*, for another of the next of kin:—

The testator's daughter *Susannah* is not appointed executrix. How then can she take?

If this stock passes under the gift of "moneys," the effect would be to defeat all the other legatees: *Collier* v. *Squire* (7).

Mr. *Willcock*, Q.C., and Mr. *Cottrell*, for the executor.

Mr. *W. R. Fisher*, for *Susannah Collins*:—

If these words are held to include the residue, the whole will is made plain. The Court struggles against an intestacy.

In *Gosden* v. *Dotterill* there was no intention to dispose of the residue. Nor can the case be now considered as good law: *Jarman* on Wills (8). It was not followed in *Dowson* v. *Gascoign* (9).

That words of this kind will carry the residue appears from *Glendening* v. *Glendening* (10); *Waite* v. *Combes* (11).

In *Lowe* v. *Thomas* there was no appointment of executors.

The context requires that the stock and shares should pass under these words.

[He also referred to *Montague* v. *Earl of Sandwich* (12); *Grosvenor* v. *Durston* (13); *Prichard* v. *Prichard* (14).]

Mr. *Eddis*, in reply:—

In *Waite* v. *Coombes* there was an express direction to the exe-

(1) 1 My. & K. 56.
(2) 5 D. M. & G. 315.
(3) Law Rep. 8 Eq. 434.
(4) 3 Drew. 704.
(5) Vol. i. p. 731.
(6) Kay, 369, 375.
(7) 3 Russ. 467.
(8) Vol. i. p. 733, note (r).
(9) 2 Keen, 14.
(10) 9 Beav. 324.
(11) 5 De G. & Sm. 676.
(12) 33 Beav. 324.
(13) 25 Ibid. 97.
(14) Law Rep. 11 Eq. 232.

V.-C. B. 1871 COLLINS v. COLLINS.

cutors "to take and receive" all moneys that might be in the testator's possession or due to him.

The VICE-CHANCELLOR:—That cannot amplify the authority which the executor has by law.

Mr. *Eddis*:—It is evidence of intention.

The rule in *Gosden* v. *Dotterill* (1) that the word "money," if used without an explanatory context, is to be construed strictly is not interfered with by cases which turn upon the question of whether or not the testator has meant to pass all his residuary estate under the term "moneys."

SIR JAMES BACON, V.C.:—

The only importance of this case arises from the conflicting nature of some of the decisions, and it was with a view to that conflict of authority only that I called upon Mr. *Eddis* to reply.

In *Waite* v. *Combes* (2), Sir *J. Parker* seems to have been led to the conclusion that the word "moneys" would include a sum of stock, because there was a general direction to the executors to take and receive all moneys that might be in the testator's possession or due to him at the time of his decease. But whether it be so expressed or not, it is always the duty of executors to take and receive all moneys in the testator's possession or due to him. The present case must be governed entirely by that principle of construction.

First, there is a general bequest of the whole of the testator's "worldly goods and chattels." The executor has sold the stock and shares. Having done this, he possessed himself of the whole of the testator's "worldly goods and chattels." Out of those moneys he has to pay the debts, funeral and testamentary expenses, and legacies. Then follows a specific gift. He bequeaths to his daughter *Susannah* "all things in the house remaining of whatsoever kind," about which there is no doubt, and "all moneys, both in the house and out of it." That is clearly a specific bequest, valid when assented to by the executor, and clear in its terms.

It has been decided that the word "money" will not pass stock, but the bequest will carry whatever there was which could be

(1) 1 My. & K. 56. (2) 5 De G. & Sm. 676.

said to be money, in the testator's house and out of it, in the sense in which he used the word "money."

The decisions are so clear that I am bound to hold—the executor having assented to the specific bequest as far as the money, strictly so called, in the house and out of it, is concerned—that the daughter *Susannah* takes only those items, and that the moneys which would have remained in the executor's hands, arising from the sale of the stock and shares, after payment of the debts, funeral and testamentary expenses, and legacies, are undisposed of, and go to the next of kin.

The executor must pay the costs of the suit out of the moneys in his hands.

Solicitor for the Plaintiff: Mr. *H. R. Silvester.*

Solicitors for the Defendants: Messrs. *J. & C. & W. Rogers;* Mr. *E. S. Stephenson.*

COOK *v.* HART.

Foreclosure Suit—Sale by Plaintiff confirmed with Defendant's Consent—Costs of Plaintiff in priority to Defendant.

Legal mortgagees having filed a bill for foreclosure only, amended their bill by stating that they had, with the Defendant's consent, contracted to sell the property, and prayed that the purchase might be carried out under the sanction of the Court. By a consent decree, the Court ordered the sale to be carried out. The purchase-money being sufficient only to pay the principal and interest with a small balance over:—

Held, that the Plaintiffs were entitled to their costs of suit so far as the fund would go, before the Defendants were paid any costs.

Observations on *Macrae* v. *Ellerton* (1).

LR 17 Eq 422-3.

BY several conditional surrenders, the last being dated the 25th of November, 1840, certain copyholds in *Lincolnshire* were surrendered by *Charles Hart* to the use of *Thomas Ayliff* and *Jarvis Cook*, their heirs and assigns, to secure £2500 and interest at 4 per cent.

On the 7th of November, 1851, *Charles Hart* died, having de-

(1) 6 W. R. 851; 4 Jur. (N.S.) 967.

V.-C. B. 1871 COOK v. HART.

vised the equity of redemption in the copyholds to devisees (whom he also appointed executors), and their heirs, upon trust for sale. The devisees renounced and disclaimed, whereupon administration with the will annexed was granted to *William Hart*, a son of *Charles Hart*.

The customary heir of *Charles Hart*, deceased, was his eldest son *Charles Hart*, who was never admitted.

Jarvis Cook, having survived *Thomas Ayliff*, entered into receipt of the rents and profits of the mortgaged copyholds, and so continued until his death.

In June, 1852, *Jarvis Cook* was admitted to the copyholds.

In 1859 the copyholds were enfranchised; and the lands were conveyed to the use of *Jarvis Cook*, his heirs and assigns, subject to an annual rent-charge.

On the 1st of September, 1867, *Jarvis Cook* died, having by will devised his real estate to *John Frederick Cook* and *Seth Holliday Savage*, and their heirs, upon trust for sale.

The heir-at-law and by custom of *Jarvis Cook* was *John Frederick Cook*.

On the 11th of November, 1868, *J. F. Cook* and *Savage* filed this bill against *Charles Hart*, *William Hart*, and the other beneficiaries under the will of *Charles Hart*, deceased, and the official assignee of one of them who had been adjudicated a bankrupt, praying for the usual accounts on the footing of a mortgagee in possession, and foreclosure. The bill did not pray a sale.

On the 23rd of April, 1869, the bill was amended, stating that on the 18th of April, 1868, the Plaintiffs entered into a contract to sell the premises for a sum of £3300, that the purchaser had paid a deposit and entered into possession, alleging that the sale would be for the benefit of all the persons interested in the equity of redemption of the premises, and praying that the contract might be confirmed and carried into effect by the direction of the Court, and that out of the purchase-moneys and interest payable under the contract, what should be certified to be due to the Plaintiffs, and the costs of and incident to the sale (less the deposit), should be paid to the Plaintiffs, and the residue to the parties entitled thereto.

By a decree made in June, 1869, on further consideration, the

Defendants not opposing, it was ordered that the sale be carried into effect; and that (amongst other accounts and inquiries) there should be taken an account of what was due to the Plaintiffs "under and by virtue of their mortgage securities, and for their costs, charges, and expenses properly incurred of and incident to the sale." Upon this the Chief Clerk certified finding to be due to the Plaintiffs, for principal and interest, £3894 10*s.* 8*d.*, which, with £77 12*s.* 3*d.* for taxed costs of sale, fees, repairs, and other charges and expenses properly incurred, and other sums, amounted altogether to £4636 9*s.* 11*d.*; and due from them in respect of rents and profits received, £1797 12*s.* 5*d.*; leaving a balance due to them of £2838 17*s.* 6*d.* The sale moneys ordered to be paid into Court and invested amounted to £3067 6*s.* 1*d.*; so that the estate was sufficient to pay the principal and interest, and yield a balance of about £220.

A question arose about the costs of the suit, and a correspondence ensued, which was terminated by a letter from the Plaintiffs' solicitor, stating that they would not consent to any portion of the fund in Court being paid out to the Defendants.

Upon settling minutes of order on further consideration,

Mr. *Kay*, Q.C., and Mr. *W. Pearson*, for the Plaintiffs:—

We are entitled to our costs of suit first. The rule of the Court is distinctly in our favour.

In *Macrae* v. *Ellerton* (1), which seems at first sight the other way, the case was this: Vice-Chancellor *Stuart* held that, just as where a mortgagee, not content with praying for a sale or a foreclosure, goes on to pray, as he has a right to do, for the administration of the estate, the costs of all parties will be ordered out of the estate—so, where after ineffectual attempts to sell under his power, the mortgagee filed a bill, and sales were made under the order of the Court, the costs of the parties whose assistance the mortgagee had required were ordered out of the proceeds. But this decision was not followed by the Master of the Rolls (December 17, 185[illegible]) in *Cutfield* v. *Richards* (2), nor by Vice-Chancellor *Kindersley* (June 11, 1859) in *Wade* v. *Ward* (3), nor by the Lord

(1) 6 W. R. 851; 4 Jur. (N.S.) 967. (2) 26 Beav. 241.
(3) 4 Drew. 602.

V.-C. B. 1871 COOK v. HART.

Chancellor, when Vice-Chancellor *Wood* (February 21, 1860), in *Tuckley* v. *Thompson* (1).

Other authorities in our favour are *Upperton* v. *Harrison* (2) and *Barnes* v. *Racster* (3).

Mr. *Amphlett*, Q.C., and Mr. *Parke*, for the Defendants:—

Macrae v. *Ellerton* (4), which is an authority exactly in point, has never been overruled.

This is not the case of a mortgagee praying for a foreclosure, and then availing himself of the statutory power of the Court to order a sale instead. He does not pray for a sale. He prays for a foreclosure only; and then by arrangement the bill is turned into one for having a sale, effected by consent, sanctioned by the Court. Without the Court's sanction the contract would have been *ultrà vires;* and so by arrangement a decree was taken, not for sale, nor for foreclosure, but for having a particular contract carried into execution. Under these circumstances, we say that the costs of the suit ought to be first paid.

Macrae v. *Ellerton* was followed by Vice-Chancellor *Stuart* in *Fuller* v. *Morgan* (5).

The Defendants have been brought here for the convenience of the Plaintiffs.

The other cases were decided each on special grounds of its own.

Mr. *Simmonds*, for the assignee.

SIR JAMES BACON, V.C.:—

But for the differences which appear in some of the cases, I should have considered this matter to be free from doubt.

In *Macrae* v. *Ellerton*, Sir *John Stuart* seems to have thought that there were circumstances which justified a departure from the general rule. It is very likely, indeed, that if the same state of circumstances should arise again which existed there, the Court would pronounce exactly the same judgment as was delivered

(1) 1 J. & H. 126.
(2) 7 Sim. 444.
(3) 1 Y. & C. Ch. 401.
(4) 6 W.R. 851; 4 Jur. (N.S.) 967.
(5) Seton on Dec. p. 380.

by the Vice-Chancellor. But that decision, invading as it was supposed to do the settled rule of the Court, was brought under the review successively of the Master of the Rolls, Vice-Chancellor *Kindersley*, and the Lord Chancellor. Not a shadow of doubt existed in the minds of any of these learned Judges as to what the guiding principle of the Court, in dealing with costs in cases of this kind, is. The costs of a mortgagee are the costs of realising his security. He takes the costs of realising his security, because he holds the property as a security for his debt. Upon what principle the heir-at-law or devisee can interfere with that right, I am at a loss to understand. The property is the property of the pledgee; and the Court can take nothing from the estate until the mortgagee's claim is satisfied.

17 Eq 422

Why there should be any difference in the case, because a sale has taken place under the sanction of the Court, I cannot see. That the sale was effected with the consent of the mortgagor makes it all the stronger, because it appears that after the parties were at arms' length, the Defendants themselves urged on the sale, under the expectation that something might possibly be left for them.

The Plaintiffs may take what is certified to be due to them for principal and interest at once; their costs of suit to be taxed, unless the Defendants agree to let them take the balance; and anything that may remain will go to the Defendants.

Solicitors for the Plaintiffs: Messrs. *T. H. & A. R. Oldman*, agents for Messrs. *Caparn & Willders, Holbeach.*

Solicitors for the Defendants: Messrs. *Wright & Venn.*

V.-C. B.
1871
July 15.

CHATFIELD *v.* BERCHTOLDT.

Legacy Duty—Annuity for Lives charged on Land in England—Foreign Domicil—Will—Bequest of Share in the Annuity.

Legacy duty is not payable on a share bequeathed by the will of a person domiciled in a foreign country in an annuity for lives charged on English lands.

Reversed by L.J.L.R. 7 Ch. 192

PETITION.

By a codicil to the will of *Francis Charles*, Marquess of *Hertford*, the testator bequeathed as follows:—

"I do hereby, by virtue of the power given to me by the settlement dated on or about the 2nd of October, 1802, executed by my father and myself, to charge my settled estates in the county of *Suffolk*, and the parishes of *Lambeg* and *Glenavy*, in the county of *Antrim*, in *Ireland*, with an annual rent-charge or charges not exceeding in the whole the yearly sum of £700, and all other powers enabling me in this behalf, limit to the use of *Louisa Dillon Strachan*, widow of Sir *Richard Strachan*, Baronet and Admiral, during her life, this annual sum or yearly rent-charge of £700 of lawful money of *Great Britain* to be issuing and payable out of, and charged or chargeable upon, all the hereditaments which by the said indenture of release and settlement I am authorized to charge as aforesaid, clear of all taxes and outgoings whatsoever, to commence from my death, and to be paid by equal quarterly payments in every year. And I hereby limit and appoint to the said widow, *Louisa Dillon Strachan*, all such powers to recover the said yearly rent-charge by distraining upon the hereditaments hereby charged therewith, and selling such distress, as landlords have by law for recovery of rent service in arrear. And after the death of the said *Louisa Dillon Strachan*, widow, I desire and direct that the said rent-charge of £700, by virtue of settlements aforesaid, be continued and equally divided, during their lives and the life of the longest liver, to *Matilda Strachan*, *Charlotte Strachan*, and *Louisa Strachan*, the three daughters of the said Admiral Sir *Richard Strachan*, Baronet, to whom I am a guardian; in manner

that, when all three shall have died, the hereditaments shall be discharged for ever of the same, but to continue payable, with the powers and distresses mentioned above, to these said children, my wards, after their mother's death, during their lives and the life of the survivor of them."

By a subsequent codicil dated the 17th of September, 1835, the testator declared as follows :—

"All bequests to women I wish . . . . to be independent of present or future husbands' control."

The testator died on the 1st of March, 1842.

Charlotte Strachan, afterwards Countess *de Zichy Ferraris*, by her will, in the English form, dated the 8th of January, 1850, appointed, gave, and bequeathed all her money, securities for money, and other personal estate whatsoever and wheresoever (except her jewels, trinkets, clothes and ornaments of the person), of or to which she then was, or at the time of her death might be, entitled, for her separate use, or over which she had or was entitled to exercise any right or power of appointment or disposition whatever, unto *Charles Chatfield* and *Richard Edwin Chatfield*, upon trust to convert into money the personal estate which should not consist of money, and to stand possessed of the moneys which should come to their hands under . . . . the said trust for sale or conversion, in trust, in the first place, to reimburse themselves all costs they might have incurred in the execution of the trusts thereby in them reposed; and as to the residue of such moneys to invest the same as therein mentioned. And as to one moiety of the said trust funds upon trust to pay the annual income thereof unto her sister the Countess *Berchtoldt* (formerly *Matilda Strachan*), for life, for her separate use, and after her death, upon trust to transfer the same moiety and the income thereof to *Richard*, eldest son of the Countess *Berchtoldt*, if he should be living at the Countess's decease, with contingent limitations to the other sons of the Countess as therein mentioned; and as to the other moiety upon trust to pay the annual proceeds thereof unto her other sister, the Princess *De St. Antimo Ruffo* (formerly *Louisa Strachan*), for life, for her separate use, and after her death upon trust to pay the same moiety and the interest thereof to *Leopoldina*, daughter of the Princess, and widow of *Paul Marulli*, Duke *d'Ascoli*, if she should

V.-C. B. 1871

CHATFIELD v. BERCHTOLDT.

be living at the death of the Princess, with a contingent remainder over as therein mentioned. She appointed *Charles* and *Richard E. Chatfield* her executors.

The Countess *de Zichy Ferraris* died on the 10th of November, 1851, domiciled in *Hungary;* and probate of her English will was granted by the Prerogative Court of *Canterbury* to *Charles Chatfield.*

On the 20th of December, 1852, the suit was instituted by *Charles Chatfield* against the Countess *Berchtoldt,* her husband and sons, the Princess *St. Antimo Ruffo,* her husband, and daughters, and others, for administration of the real and personal estate of the Countess.

On the 5th of January, 1867, *Louisa Dillon Strachan,* the mother, who had since become the Marquise *de Salza,* died, also domiciled abroad; and her sole personal representative in this country was *Henry Wreford.*

The Plaintiff having died, and the suit having been revived by his personal representatives, by an order made by Lord Justice (then Vice-Chancellor) *James,* on the 15th of June, 1870, upon the Petition of the Plaintiffs, it was declared that, according to the true construction of the codicil, *Matilda Strachan, Charlotte Leopoldina Strachan,* and *Louisa Strachan,* upon the death of their mother, became entitled to the yearly rent-charge of £700, in equal shares as tenants in common; and that the one share to which *Charlotte,* afterwards Countess *de Zichy Ferraris* became so entitled was vested in the Plaintiffs, as her legal personal representatives, upon the trusts of her English will.

This Petition was now presented in the suit by the Plaintiffs, as legal personal representatives of the Countess, stating as above, and that legacy duty had been claimed under the will of the Countess in respect of the one-third of the annuity; and praying for the direction of the Court as to whether legacy duty was properly payable by the Petitioners in respect of the one-third of the annuity bequeathed by the will and codicil of the Marquess, to which the Petitioners were entitled as legal personal representatives of the Countess.

Mr. *Amphlett,* Q.C., and Mr. *Owen,* for the Petitioners.

Mr. *W. W. Karslake*, for the Commissioners of Inland Revenue :—

The question turns upon the following enactments—36 Geo. 3 c. 52, ss. 20, 7 (1); 45 Geo. 3, c. 28, s. 4 (2); 55 Geo. 3, c. 184, Sched. part 3 (3).

The case of an estate *pur autre vie* is also dealt with by the *Wills Act* (1 Vict. c. 26), which by sect. 3 enacts that it shall be lawful for every person to devise, bequeath, and dispose of all real and personal estate which he shall be entitled to at the time of his death; and that this power shall extend to "estates *pur autre vie*, whether there shall or shall not be any special occupant thereof," of whatever tenure the same may be, "and whether the same shall be a corporeal or incorporeal hereditament;" and by sect. 6 enacts, that if any estate *pur autre vie* "shall come to the executor or administrator . . . by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator." . . .

We say that this interest is an estate *pur autre vie*, which is disposable of as personal estate, that is to say, that it vests in the

(1). Sect. 20: "And be it further enacted, that estates *pur auter vie*, applicable by law in the same manner as personal estate, shall be charged with the duties hereby imposed as personal estate."

Sect. 7: "And be it further enacted, that any gift by any will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this Act." . . .

(2). Sect. 4: "And be it further enacted that every gift" (following the words above) "as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this Act." . . .

(3) Schedule, Part III. (II.) — "Where the testator . . . shall have died after the 5th day of April, 1805."

"For every legacy, specific or pecuniary, or of any other description, of the amount or value of £20 or upwards, given by any will . . . of any person . . . either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate " . . .

"Where any such legacy . . . shall have been given . . . to or for the benefit of any stranger in blood to the deceased, a duty at and after the rate of £10 per cent. on the amount or value thereof."

V.-C. B. 1871 CHATFIELD v. BERCHTOLDT.

executor by virtue of his appointment; that the bequest of it requires his assent; and that upon such assent being given it vests in the person pointed out in the will.

This is the first occasion on which the question has been raised as to whether legacy duty is payable under the will of a person domiciled abroad in respect of an estate *pur autre vie* in an annuity charged upon lands in *England*. There is no doubt that if this were pure personalty the question would be governed by authority, as in the leading case of *Thomson* v. *Advocate-General* (1), which decides that personal property having no *situs* of its own, follows the domicil of its owner; and that the law of the domicil decides whether his personal property is liable to legacy duty. But the whole difference lies in this—that here is a rent charged upon land; and the question is, whether it is not thereby rendered of the class of immoveable property: *Story's* Conflict of Laws (2).

From *Co. Litt.* it appears that a rent-charge is an incorporeal hereditament (3); and that the remedy for its recovery is by distress (4). It is an annuity, and something more; for the owner of it may have both a writ of annuity and a remedy against the land; but a rent-charge must be demanded on the land, and to be well tendered must be tendered on the land, and nowhere else (5).

In the course of Lord Chancellor *Lyndhurst's* judgment in *Thomson* v. *Advocate-General* (6), he expressly distinguishes the case of a charge upon land. Referring to a decision relied upon in the Court below, he says that in that case "It appears that the

(1) 12 Cl. & F. 1.

(2) Par. 447: "Here, as we have already seen, not only lands and houses, but servitudes and easements, and other charges on lands, or mortgages and rents, and trust estates, are deemed to be, in the sense of law, immoveables, and governed by the *lex rei sitæ* (*b*)."

(3) Co. Litt. 20 a.

(4) Ibid. 144 a.

(5) Ibid. 201 a, b.

(6) 12 Cl. & F. 22.

(*b*) *Ante*, § 382; Poth. Cout. d'Orléans, ch. 1, § 2. *P. Voet* puts on this point the very sensible distinction, that whether rents are to be deemed personal or real depends upon the question, whether they are charged on real property or not; "*Vel enim talium redituum nomine sunt affecta immobilia, id est, super immobilibus sunt constituti, et immobilibus erunt adscribendi, adeoque statutum loci spectabitur; vel immobilia affecta non sunt illis reditibus, tumque mobilibus poterunt accenseri; atque adeo statutum loci personæ, cujus illi sunt reditus, inspici debebit;*" *P. Voet*, De Stat. 9, ch. i., n. 13, p. 259.

legacy duty was charged upon real estate, and, therefore, it would not come within the principle which I have stated."

As to succession duty, *Wallace* v. *Attorney-General* (1), decides that succession duty is not payable on legacies given by the will of a person domiciled abroad; but as this is a legacy of an interest charged on land, if it be held that legacy duty is not payable, we claim succession duty.

Mr. *Fry*, Q.C., objected that this was not prayed by the Petition.

The VICE-CHANCELLOR was of opinion that the question of legacy duty only was arguable on this Petition.

Mr. *Karslake*:—If the Crown succeeds, we are entitled to our costs out of the estate: *Lyall* v. *Paton* (2).

Mr. *Tripp*, for the Countess *Berchtoldt* and her sons:—

The property is unconnected with this country, unless and until it becomes a *chose in action* to be realised by proceedings in our Courts.

Mr. *Fry*, Q.C., and Mr. *James T. Anderson*, for the Princess *St. Antimo Ruffo* and her daughter:—

The contention of the Crown is, that we are not to look to the *lex domicilii*, but are bound by the *lex loci*; and why? Because this is an annuity charged upon real estate.

The answer to that is, either this is personal estate, or it is not. If it is personal estate, then it follows the person; the law of the place of domicil, namely *Hungary*, must apply, and so *cadit quæstio*. If it is real estate, then, it being beyond question that the object of the *Legacy Duty Act* was primarily to deal with personal estate only, the Crown must shew some section expressly charging this class of real property. All they rely upon is the 20th section, which in terms applies to personal estate only; and so the claim fails.

They contend that this is not personal estate, for the purpose of bringing in the *lex loci*; and then they say that it is personal estate, for the purpose of bringing in the 20th section.

The first inquiry should be, is this interest within the *Legacy*

(1) Law Rep. 1 Ch. 1. (2) 25 L. J. (Ch.) 746.

V.-C. B. 1871 CHATFIELD v. BERCHTOLDT.

Duty Act at all? We say it is not an estate *pur autre vie* within the meaning of the 20th section. It is not so described in *Coke* (1), who speaks of such an estate as this as a form of a tenancy for life; and, being as it is, an estate in *A.* during the lives of *A.*, *B.*, and *C.*, and the life of the longest liver, it is rather an estate for life, with an estate *pur autre vie* superadded: *Rosse's Case* (2); *Utty Dale's Case* (3); *Preston's* Conveyancing (4).

But if it were an estate *pur autre vie*, it is made personal estate by the Act itself, and so comes within *Thomson* v. *Advocate-General* (5).

The fact of its being charged upon land in this country does not make it the less distributable according to foreign law.

Mr. *V. Hawkins*, for the personal representative of the tenant for life:—

The principle upon which duties are imposed by the Legislature of this country is, that persons who are claiming by "virtue of the laws of this country" (6) ought to contribute to the revenue of the country. In this instance the property is being claimed by virtue of the laws of *Hungary*. There cannot be two successions to the same estate, one in one country and another in another.

The proposition in *Story* may be admitted—that leaseholds and charges on land are to be governed by the *lex loci*; for, trying the question whether this is real or personal estate by our own law, the test is—does it pass to the personal representative? There can be no doubt that it does, and hence that it is within the principle of *Thomson* v. *Advocate-General* and *Wallace* v. *Attorney-General* (7).

[He also referred to *Davidson's* Conveyancing, "Wills," (8) and *Jarman* on Wills (9).]

Mr. *Karslake*, in reply:—

Whatever may have been the nature of this interest before the death of the testatrix, directly she died it must have become an estate *pur autre vie*, and hence expressly within the statute; and

(1) Co. Litt. 41 b.
(2) 5 Rep. 13 a.
(3) Cro. El. 182.
(4) Vol. iii. pp. 58, 404.
(5) 12 C. L. & F. 22.
(6) Law Rep. 1 Ch. 7.
(7) Ibid. 1 Ch. 1.
(8) Vol. iv. p. 417, note (*b*).
(9) Vol. i. 563, n.

although both the *Legacy Act* and the *Wills Act* declare estates *pur autre vie* to be personal estate, it has never yet been decided that an estate *pur autre vie* in an annuity charged on land is such personal estate as is within *Thomson* v. *Advocate-General* (1).

There is no reason why there should not be two successions to the same estate, one here and another abroad.

SIR JAMES BACON, V.C. :—

In my opinion, legacy duty is not payable.

It is said this is an estate *pur autre vie,* which is a mere technical expression. This expression is not to be translated "for the life of another," but it describes a thing known to the law. I think, according to the authorities Mr. *Fry* referred to, this particular interest is not an estate *pur autre vie* in its technical meaning and signification. It is an estate which is to endure, no doubt, as long as three lives shall live, but it is not such an estate as is described in the Act as an estate *pur autre vie.*

But if it were, I think the statute has concluded the question; because the Act of the 36 Geo. 3, c. 52 has, in the most express terms, declared that an estate *pur autre vie* "shall be charged with the duties hereby imposed as personal estate." The 6th section of the *Wills Act* is *in pari materiâ,* and declares exactly the same thing.

I consider that this interest is personal estate for all purposes of administration; that it is assets in the hands of the executor, to be applied and distributed in all other ways in which personal estate is applicable.

Then I have not heard Mr. *Hawkins'* argument answered. The right of the legatees to receive this legacy is their birthright. They claim in the character which they would have had if the testatrix's whole property had been in *Hungary.* She living and dying in *Hungary,* and being domiciled in a foreign country, her personal estate is distributable amongst the persons whom the foreign law has ascertained to be entitled to it, and is not subject to the fiscal regulations of this country in the shape of legacy duty.

That, I apprehend, disposes of the question raised here, and I hold that legacy duty is not payable in this case.

(1) 12 Cl. & F. 1.

V.-C. B. 1871 CHATFIELD v. BERCHTOLDT.

Mr. *Amphlett*:—According to the authority cited, the Crown, failing, will have no costs.

The VICE-CHANCELLOR:—That is so: the costs of all the other parties will come out of the fund.

Solicitors for the Petitioner: Messrs. *Davies & Williams.*

Solicitors for the Respondents: *The Solicitor to the Inland Revenue;* Messrs. *Capron, Dalton, & Hitchins;* Messrs. *Farrer, Ouvry, & Co.*

V.-C. B. 1871 *July* 29.

In re SANKEY BROOK COAL COMPANY.

In re RADLEY AND BRAMALL.

Vendor and Purchaser—Company—Grant of Powers of Distress and Entry to Lenders to secure Payment of a Royalty—Liquidation—Sale—Lenders not necessary Parties to Conveyance.

A limited colliery company resolved to enlarge its capital, and that 6*d.* per ton of coal should be retained to repay the persons advancing the additional capital, with powers of distress and entry; and in conformity therewith, by a deed to which the company and the lenders were parties, in consideration of the advance, the company covenanted to repay the sums advanced, and to retain 6*d.* per ton to pay for such advances, with power for a majority of the lenders irrevocably to appoint a receiver; also that if default should be made by the company in retaining and paying the said rate, or if a majority of the lenders should be of opinion that the company could not in any half-year pay such rate, it should be lawful for such majority to enter and distrain upon the collieries and business of the company.

The company being in liquidation under supervision, the liquidators contracted to sell one of the collieries:—

Held, that the lenders were not necessary parties to the conveyance by the liquidators to the purchaser.

THIS was an adjourned summons on behalf of the liquidators of the *Sankey Brook Coal Company, Limited*, for the opinion of the Judge, as to whether the Rev. *Thomas Radley* and *Henry Bramall*, purchasers of part of the company's property, called the *Ashton Green Colliery*, were entitled to require that the lenders, under the deeds of covenant below mentioned, should join in the conveyance to them of the property.

The first of the above-mentioned deeds of covenant was dated

the 4th of January, 1868, and made between the company of the first part, and the persons therein named and described, and afterwards called "the lenders," of the second and third parts, and after reciting the establishment of the company with limited liability for the purchase of the *Sankey Brook Colliery*, with a capital of £60,000 in 40,000 shares of £1 10*s.* each, the purchase of the colliery, and that the capital had been increased from £60,000 to £105,000, the deed proceeded to recite that by resolutions passed at a special general meeting on the 7th of October, 1867, the directors were empowered, without any further authority beyond confirmation of the resolution, to borrow, in addition to the £20,000 sterling mentioned in the 29th article of association of the company (and already authorized to be borrowed) any further sum or sums not exceeding in the whole the additional sum of £15,000 sterling, so that the loan capital of the company might amount to £35,000; and that in order to secure the repayment of the £35,000, or any part thereof, with interest, the directors were empowered to give such securities as were mentioned in the 29th article, and it was resolved that, in addition thereto, such securities might provide that 6*d.* on each ton of coal and slack sold by the company should be retained before calculation and division of profits, to be paid every half-year in reduction of the loan and interest and any arrears thereof; and that the persons advancing such loan, thereinafter called "the lenders," should have power to appoint a receiver with the statutory powers conferred by the 23 & 24 Vict. c. 145, ss. 19–23; and should have power, "if they shall be of opinion that the company cannot in any one half-year pay such tonnage rate, to enter upon the premises of the company and to seize, distrain upon, and sell, the goods and chattels of the said company, or so much as may be necessary," and thereout realise and pay the loan, interest, cost, charges, and expenses then owing; and that the draft deed of security between the company and the lenders was thereby approved and adopted. The deed then recited that the above resolutions were duly confirmed, that the parties thereto of the second and third parts had agreed to advance £28,576, as part of the £35,000, upon the security thereinafter mentioned; that £25,447 10*s.*, part thereof, had been duly paid by the parties thereto of the second part, and £3128 10*s.*, residue thereof, had been

V.-C. B. 1871

In re Sankey Brook Coal Company.

In re Radley and Bramall.

agreed to be paid by the parties thereto of the third part, and that the draft of the indenture now in recital was the draft referred to in the above special resolutions.

It then witnessed that the parties thereto of the third part thereby covenanted to pay the sums so agreed to be paid by them respectively as aforesaid; and that, in consideration of the above payment and agreement to pay, the company covenanted with the lenders and each of them to repay the said sums; and that "the said company shall and will, as from the 1st day of November, 1867, so long as any principal or interest money shall remain due on the security of these presents, retain, before the appropriation or division amongst the shareholders . . . of any dividend or profit, the sum of 6*d.* per ton on each ton of coal and slack sold by the company," and would pay the amount of the moneys retained into a bank therein mentioned in the names of certain of the lenders, upon the trusts therein declared. The company also covenanted with the lenders and each of them that the company would at any time whilst any principal or interest should remain due on that security, "at the request of the person or persons for the time being entitled to the repayment of the said loan capital of the company, or a majority in value of such persons, appoint, or join with such person or persons in appointing, such person or persons as shall be nominated by the said parties so entitled as aforesaid, or a majority of them in value, to be receiver, agent, and attorney from time to time in the name of the said company or otherwise, to receive the rents and profits of all the hereditaments and premises of or belonging to the said company, and to receive all sums of money which shall or may from time to time become due to, or would, except for this appointment, be receivable by the said company in respect of the said 'colliery,' and of the sale of coal, minerals, and materials, or otherwise howsoever in respect of the said business of the said company, as colliery proprietors and coal merchants as aforesaid, and the profits thereof, and in case of non-payment thereof to use all proper remedies for recovering and obtaining payment of the same or any part thereof, and to do all things expedient for recovering and receiving the said rents and profits and moneys, as fully and effectually as the said company could do." The company further covenanted with the lenders and

each of them that they would not revoke the powers or authorities thereby contained for such receiver, or any of them. It was also declared and agreed that if default should be made by the company in retaining and paying the said rate of 6*d.* per ton on all coal and slack in manner therein provided, or "in case the majority in value for the time being of the persons entitled to the said loan capital shall be of opinion that the company cannot in any one half-year pay such tonnage rate," then it should be lawful for the majority in value of the persons entitled to the repayment of the loan capital, "into and upon all or any part of the lands, moneys, hereditaments, collieries, and premises of or then belonging to the company to enter, and for all principal and interest which shall then be due to distrain, and the distress and distresses then and there found to dispose of in due course of law, as landlords may do in respect of distresses for rent reserved upon leases." The company also covenanted that during the continuance of the security free access by a person or persons duly appointed by the lenders should be had to the books of the company.

The second deed was indorsed on the last, dated the 1st of December, 1868, and made between the company of the one part and the therein within named *Samuel Hargreaves* of the other part. It recited that there remained £27,033 0*s.* 1*d.* due on the security of the indenture; that £5400 had been raised on debentures; that there remained power of raising a further sum of £2566 19*s.* 11*d.*; that *Hargreaves* had agreed to advance £500, and witnessed that the £500 should be considered as part of the therein within mentioned loan capital, and that the therein within security should extend to it; also, that if the tonnage rate paid should amount in each year to £5000, the £500 should not be called in for six years.

The third deed was dated the 8th of December, 1868, and made between the company of the first part and the persons therein named and described, and thereinafter called "the lenders," of the second and third parts. After reciting that there had been repaid by the company the sum of £1200 9*s.* 11*d.*, and that the whole amount then due in respect of the £35,000 capital was £32,433 0*s.* 1*d.*; that by another special resolution, dated the 25th of August, 1868, the directors had been empowered to borrow further sums, not

V.-C. B.
1871
In re Sankey Brook Coal Company.
In re Radley and Bramall.

exceeding the additional sum of £25,000, so that the loan capital might amount to £60,000; and that the parties thereto of the second part had advanced the sum of £17,600 10*s.*, and the parties of the third part had agreed to advance the sum of £4677 10*s.*, making together £22,278, it was witnessed that the company thereby covenanted to repay the sums so advanced and to be advanced; and the deed contained similar provisions and powers to the former, with regard to the rate of 6*d.* per ton, the appointment of a receiver, and the rights of distress and entry; and it was provided that if the tonnage rate paid should amount to £5000 a year the £21,828 should not be called in for ten years.

On the 17th or 18th of September, 1869, resolutions were passed for winding up the company voluntarily, and for the appointment of liquidators; and on the 18th of December following the liquidation was ordered to be continued under supervision.

On the 10th of May, 1870, the liquidators entered into a provisional contract for the sale of the *Ashton Green Colliery*, and on the 20th of May following the contract received the sanction of the Court.

Abstracts were delivered, and requisitions were sent in on the 22nd of June, 1870.

In answer to the general inquiry, whether the vendors were aware of any incumbrance not disclosed, the vendors' solicitor said: "The vendors send an abstract of two deeds none of the powers in which have been enforced against the company, and which the vendors are advised do not, since the making of the order for winding-up under supervision, give the persons claiming under them any other rights than those of ordinary creditors: see sect. 163 of the *Companies Act*, 1862."

The purchasers' solicitor replied as follows (after referring to the deeds): "The lenders under those mortgages should concur to release the property from their lien or charge thereon."

In the result it was arranged to submit the point to the decision of the Court.

It did not appear that a receiver had ever been appointed.

Mr. *Fry*, Q.C., and Mr. *Finch*, for the liquidators:—

The concurrence of the lenders is not necessary.

The first question is, is this a covenant binding the real estate, or only personal to the company? We say it is a personal covenant only, and that it does not affect to create any charge. The only conceivable ground on which it can be supposed to create a charge is, that a power of distress and entry implies a rent-charge for the amount for which the holder of the power is entitled to distrain.

In this instance the whole of the legal estate was outstanding in a mortgagee, so that if one technical rule of law is had recourse to to shew that this is a rent-charge, another rule may be invoked, which is, that in order to establish your right to a rent-charge you must have a legal interest in the land: *Freeman* v. *Edwards* (1).

Mr. ~~*Sylvester*~~ *Hunter*, for debenture-holders:—

If the Court should hold that the lenders have a lien on the property, the interests of the debenture-holders are gone. It is their interest, therefore, to contend that the lenders are not necessary parties.

It was not intended by the resolutions to give these persons any dominion over the property. The receiver, who was to have statutory powers, had no authority to pay any principal—only interest. The power of distress is merely a license to receive certain goods and chattels; and in that view the deeds were bad as not having been registered under the *Bills of Sale Act.*

That a covenant of this kind, not being a charge on any specific lands, creates no lien, appears from *Freemoult* v. *Dedire* (2) and *Berrington* v. *Evans* (3).

Mr. *Waley*, for the purchasers:—

At any rate the purchasers could not have ventured to complete without the decision of the Court.

When it is said that this power of distress does not amount to a specific lien on the lands, it must be observed that it is the lands, works, and business of this company that are specified. So that had this company not been in liquidation a most grave question would have arisen whether the company could have turned round, and rendered all these securities illusory.

(1) 17 L. J. (Ex.) 258. (2) 1 P. Wms. 429.
(3) 3 Y. & C. Ex. 384.

V.-C. B. 1871

In re Sankey Brook Coal Company.

In re Radley and Bramall.

That this is a sale under a winding-up, no doubt makes a great difference; but it is a winding-up under supervision only.

Sir James Bacon, V.C.:—

I look upon this contract as the contract of the company whilst it was a going concern.

[His Honour read the main provisions of the first deed, and continued:—]

It happens that the lenders did not contemplate that event which has occurred, namely, that this company has, by process of law, ceased to exist as a going concern, and that its assets have had, for the benefit of creditors, to be realised by sale; and that has been done. Suppose that the purchaser, whoever he is, may have no desire to carry on the colliery, but wishes to devote the land to building houses upon it, can it be for a moment contended that the lenders would have a right to distrain upon those houses? They were to have a remedy against the company *quâ* company. The company's assets have passed into other hands for realisation: the collieries have been brought into this Court to be sold; the purchaser has paid his money for them; and the intention of all parties would be disappointed if the lenders could follow this property in the hands of the purchaser.

The order will be that the Court, being of opinion that the persons claiming under the deed are not necessary parties to the conveyance by the liquidators, let the costs of the liquidator and purchaser come out of the estate.

Mr. *Hunter* asked for his costs.

The Vice-Chancellor:—To allow your costs, Mr. *Hunter*, would be making a very bad precedent. I cannot allow you any costs.

Solicitors: Messrs. *Sharpe, Parkers, Pritchard, & Sharpe,* for Mr. *M. W. Peace, Wigan;* Mr. *Peckham;* Messrs. *Clarke, Woodcock, & Ryland,* for Mr. *Darnton, Ashton-under-Lyne.*

RHODES *v.* BARRET.
Ex parte SINGLETON.

V.-C. B.
1871
May 30.

Administration—Two Creditors' Suits—Conduct of Cause.

A creditor took out a summons for the administration of a testator's personal estate only, which was insufficient. On the day following the hearing of the summons, another creditor, appearing by the solicitors who appeared for the Defendants to the summons, filed a bill for the administration of the personal estate, which bill he afterwards amended by making the heir-at-law a party, and praying for administration of both the real and personal estate, which together were sufficient. In the suit the same solicitors appeared for all parties. A decree having been obtained in the suit, the first creditor applied for leave to have the conduct of the cause:—

Held, that the Plaintiff in the suit could not retain the advantage which had been unfairly obtained by him, and that the Plaintiff in the summons must have the conduct of the cause.

THIS was an application on behalf of *Cuthbert Singleton*, a creditor against the estate of *Joseph Morton Barret*, the testator in the cause, to have the conduct of the cause given to him, under the following circumstances:—

The testator died on the 10th of October, 1870. The executors, who were also appointed by the will trustees of his real and personal estate, all renounced, and by deed disclaimed.

On the 15th of December, 1870, administration with the will annexed was granted to the testator's widow, *Ann Sarah Barret*, and his sister, *Elizabeth Barret*, who were the residuary legatees under the will.

On the 23rd of December, 1870, *Singleton*, who was a creditor for about £150, took out a summons, to which the two administratrixes were made Defendants, for administration of the personal estate, which was heard before the Chief Clerk on the 11th of January, 1871, and, on the application of a clerk of the Defendants' solicitors for time to reply to affidavits, was adjourned to the 25th of January.

On the 12th of January, 1871, a bill was filed by *John Rhodes*, another creditor, appearing by the solicitors of the Defendants in the administration summons, against the two administratrixes, and (as amended on the 18th of January) against *William Barret*, the

V.-C. B. 1871 RHODES v. BARRET. *Ex parte* SINGLETON.

heir-at-law, praying for administration of the personal and (as amended) of the real estate; and on the 21st of January an administration decree was made in *Rhodes* v. *Barret*.

A summons, returnable on the 26th of January, taken out on behalf of *Singleton* to have the conduct of the cause, and another summons, returnable on the 6th of March, for leave to attend the proceedings, were both now adjourned into Court.

The personal estate was insufficient, but the real and personal estate together were fully sufficient, to pay the debts. All the creditors' claims, including *Singleton's*, had been allowed, except a claim by a creditor who was also the solicitor of *Singleton*.

Mr. *Amphlett*, Q.C., and Mr. *Bagshawe*, for the applicant:—

Rhodes v. *Barret* is plainly a merely collusive suit. All the parties in it are represented by the same solicitors. The decree was taken for the purpose of defeating the applicant's summons.

This is a practice which the Court has always condemned: *Wheelhouse* v. *Calvert* (1); *Harris* v. *Gandy* (2); *Frost* v. *Ward* (3).

Mr. *Kay*, Q.C., and Mr. *W. Barber*, for the Plaintiff in *Rhodes* v. *Barret*:—

Mr. *Singleton's* summons went only to the administration of the personal estate, which was insufficient. A suit, therefore, became necessary, in order to get administration of the real as well as of the personal estate.

The proceeding by *Singleton's* summons is adverse; ours is a friendly suit; and, as it was and is instituted with entire good faith, the Plaintiff *Rhodes* ought not to be deprived of the conduct of the litigation.

SIR JAMES BACON, V.C.:—

I think this case comes clearly within the practice which has been established in this Court in such cases. It has always been the object of the Court to give no encouragement whatever to mere dexterity of practice, to mere ingenuity, which, I think, has been resorted to in this case.

The facts are very plain. On the 23rd of December, 1870, the summons was taken out by Mr. *Singleton*. It was returnable on

(1) Seton, p. 888. (2) 1 D. F. & J. 13. (3) 2 D. J. & S. 70.

the 11th of January, and ought then to have been proceeded with. It is said that that summons was defective, inasmuch as it did not comprise the real estate. On the next day, the 12th of January, the present Plaintiff filed a bill which was open to exactly the same defect, and it was not until the 18th of January that he amended his bill by making it comprise the real estate. On the 21st of January a decree was made, and as soon as the creditor in the summons obtained information of the decree having been made, he took out a summons, returnable on the 26th of January, asking for the conduct of the cause. The case is to be disposed of as if we were now talking upon the 26th of January. He finds that a bill has been filed which supplies that which was said to be defective or imperfect in his summons, and he desires, not to impede the progress of that suit, not to gain any advantage, but to have the benefit of the proceeding which he first took, and which gave him the right to the conduct of the business of the administration of the debtor's estate.

It is said that this will be introducing a hostile creditor, but I think there is no ground for that. He is no longer a hostile creditor. His claim has been admitted in the course of the proceedings in Chambers, and that which has taken place since the date of the summons can never be alleged against him, because, as I have said, his rights are to be considered as they were upon the day on which his summons was returnable. There is no ground for the notion of his being a hostile creditor, nor do I see how one farthing of expense or one hour's delay can be occasioned by his having the conduct of this cause.

In my opinion, the case comes clearly within the wholesome rule that has been established in this Court; and, although a temporary advantage may have been gained by persons conducting the suit, I do not think they can retain that advantage any longer, but I think Mr. *Singleton* is entitled to the conduct of the cause.

There will be an order according to the terms of the summons. The costs of the administration summons and of this application to be costs in the cause.

Solicitors for the Applicant: Messrs. *Singleton & Tattershall.*
Solicitors for the Plaintiff and Defendants: Messrs. *Wright & Venn.*

V.-C. B.

1871
June 3.

WILDBORE *v.* GREGORY.

Power of Appointment—Power to appoint Part of an Estate coupled with Interest in the Residue—Devise of "the Whole of my Property, real and personal"—Will not an Exercise of the Power.

Under a marriage settlement, dated in 1840, power was reserved to the husband to appoint, after the death of his wife, if she should survive him, "so much" of a particular freehold estate settled by him "as shall not exceed the annual income of £300," to the use of the children of the marriage; the same to be, in default of appointment, for the use of the children equally. The residue of the estate to be to the use of the husband, absolutely.

By his will the husband gave, devised, and bequeathed "the whole of my property real and personal, consisting of a farm" (describing the freehold estate above mentioned), "and whatever may devolve to me by virtue of the marriage settlement," to a trustee, upon trust, after the death of his wife, for his five children, in unequal shares. He further gave to the trustee a discretionary power either to divide the income of "my entire property," according to the provisions before made, or to sell the whole and divide the proceeds:—

Held, that the will did not operate as an exercise of the power of appointment.

By an indenture dated the 15th of December, 1840, being the marriage settlement of *Robert Wildbore* and *Emily Stewart*, a manor, or reputed manor, called *Tilton-on-the-Hill*, two cottages, and a farm called the *Hall Farm*, in the county of *Leicester*, of which *Robert Wildbore* was seised in fee in possession, were conveyed by him to two trustees (of whom *Robert Gregory* became the survivor) and their heirs, to the use, after the marriage, of *Adam Murray Stewart*, his executors, administrators, and assigns, for 500 years, upon the trusts thereinafter expressed and contained, and subject thereto, to the use of *Robert Wildbore* and his assigns for life, without impeachment of waste, remainder to the use that, if *Emily Stewart* should survive *Robert Wildbore*, she and her assigns should from and after his decease receive and take a yearly rent-charge of £300 out of the premises, to be in lieu of dower or free bench; and in case there should be issue of the marriage, then after the decease of the survivor of *Robert Wildbore* and *Emily Stewart*, "as to so much of the said hereditaments and premises as shall not

exceed the annual income of £300 . . . to the use of all and every or such one or more exclusively of the other or others of the children or remoter issue" of the marriage, "at such ages, days, or times, for such estate or estates, interest or interests, and if more than one in such parts, shares, and proportions, and either absolutely or conditionally, and subject to such charges, conditions, limitations over, and restrictions, to or in favour of any other or others of the said children or remoter issue," as *Robert Wildbore* should by deed or will appoint; "and in default of any such direction, limitation, or appointment, or if the same shall not extend to the entire full amount of the said annual value of £300 of the said hereditaments and premises, then to the use of all and every or such one or more exclusively of the other or others of the children or remoter issue" of the marriage, "at such ages" (repeating the former clause) as *Emily Stewart*, in case she should survive *Robert Wildbore*, and notwithstanding her coverture by any future husband, should by deed or will appoint; "and in default of such last-mentioned direction, limitation, or appointment, and so far as any such last-mentioned direction, limitation, or appointment, if incomplete, shall not extend within the limits aforesaid, to the use of all and every the children and child" of the marriage, "if more than one, in equal shares, as tenants in common, and of their several and respective heirs and assigns for ever." If any one or more of the children, being a son or sons, should die under twenty-one without lawful issue, or being a daughter or daughters, should die under twenty-one or without having been married, the share and shares of such child or children were to remain and be to the use of the other or others of the children, his, her, or their heirs and assigns for ever, if more than one in equal shares as tenants in common, the said original and accrued shares to be apportioned to them at twenty-one or marriage. It was further provided that "the residue of the said hereditaments and premises which shall exceed and be over the said annual value of £300 shall remain and be to the use of the said *Robert Wildbore*, his heirs and assigns for ever; it being the true intent and meaning of the parties hereto that the said hereditaments and premises shall be charged to the extent of £300 per annum only for the said *Emily Stewart* and the children of the

V.-C. B. 1871 WILDBORE v. GREGORY.

said intended marriage;" also that if no child or other issue of the marriage should attain twenty-one, then, subject to the payment of the yearly rent-charge of £300, to *Emily Stewart* for life, the hereditaments and premises thereby conveyed should go, remain, and be "to the use of *Robert Wildbore*, his heirs and assigns, for ever."

The deed then declared the trusts of the 500 years' term to be to raise and pay the £300 rent-charge.

On the 8th of May, 1852, *Robert Wildbore* died, having by will, dated the 19th of January, 1850, bequeathed (so far as is material), as follows:—

"I give, bequeath, and devise to my friend *Robert Gregory*, clerk .... the whole of my property real and personal, consisting of a farm and two cottages at *Tilton*, in the county of *Leicester*, and whatever may devolve to me by virtue of the marriage settlement made at the time of my marriage ... and of all moneys standing to my credit at my banking house, and of any kind of securities belonging to me, in trust for the purpose under-mentioned:—

"1. The said *Robert Gregory* is to pay to my wife *Emily Wildbore*, during the term of her natural life, the whole of the net income of the property real and personal of which I may die possessed.

"2. After the death of the said *Emily Wildbore* my entire property is to be divided into six equal portions, one to become the property of my daughter *Eveline Mary Wildbore*, one to become the property of my daughter *Florence Emily Wildbore*, and a third to become the property of my daughter *Edith Frances Wildbore*; the three remaining portions to be equally divided between my two sons, *Frederick Stewart Wildbore* and *Alfred Hemsley Wildbore*, subject to the limitations hereunder mentioned.

"3. In case of the marriage of any or of all my said three daughters, the said *Robert Gregory* is to take care to have her or their portions secured to her or them during the term of her or their natural lives, in a legal manner; unless a sufficient settlement is made upon her or them at the time of marriage.

"4. In case any or all of my said daughters marry and leave lawful issue surviving, I give her or them power to dispose of her or their portion or portions amongst her or their children or grandchildren; but if any of them die unmarried, or without lawful

issue, her or their portion or portions is to be equally divided among the surviving brothers and sisters.

"5. If all my said three daughters die unmarried, or without lawful issue, their portions are to be equally divided between my two sons, or are to go to the survivor of them.

"6. In case of the death of either of my two sons unmarried, or without lawful issue, his portion is to go to the surviving brother. In case both of my said sons die unmarried, or without lawful issue, their portions are to be divided amongst the surviving sisters, or the survivor of them. But I empower both my two sons to leave to their wives surviving them a life interest in the portion which each is to receive under this my will and testament.

"7. I give my said sons power to dispose of their several portions by will or otherwise, in case they leave lawful issue surviving them.

"8. In case my eldest son *Frederick Stewart Wildbore*, on reaching the age of twenty-one years, wish to retain possession of the farm at *Tilton*, he may, after the death of the said *Emily Wildbore*, his mother, do so, on entering into legal engagement to pay over the difference between his own share of the net income of the said farm, and the whole of the said net income, for the use of my other children, to be divided among them as is aforesaid.

"9. However, as unforeseen circumstances may arise, I give my trustee, *Robert Gregory*, full power, acting according to the best of his judgment, either to divide the income of my entire property according to the provisions before made, or to sell the whole, and divide the proceeds arising from such sale among my children, care being taken to invest the same in good legal securities" . . . .

The testator appointed his wife, *Emily Wildbore*, guardian of his children; and her and *Robert Gregory* executors of his will.

There were issue of the marriage the five children above named, all of whom survived the testator.

On the 13th of December, 1855, *Emily Wildbore*, the widow, died.

In April, 1856, the will was proved by *Robert Gregory*, the surviving executor, who was also the surviving trustee of the settlement.

In March, 1858, the five children, then infants, filed the bill in the cause against *Robert Gregory* for administration.

V.-C. B. 1871 WILDBORE v. GREGORY.

An administration decree was made in April, 1858; on the 10th of February, 1859, the Chief Clerk made a certificate; and in March, 1859, an order was made on further consideration.

In November, 1860, the Plaintiff, *Alfred Hemsley Wildbore*, died, aged about twelve years.

In November, 1862, *Eveline Mary*, the eldest surviving child, attained twenty-one, and in November, 1870, *Edith Frances*, the youngest surviving child, attained twenty-one.

A Petition was now presented in the cause by the Plaintiff, *Frederick Stewart Wildbore*, stating the above facts, and that no appointment was ever made by *Emily Wildbore*, the widow; and praying that the rights and interests of the Petitioner and his sisters in the manor and hereditaments of *Tilton* under the will and settlement might be determined by the Court.

It was stated that the yearly rent of the farm at *Tilton* was about £500.

Mr. *Charles Hall*, for the Petitioner:—

The power of appointment created by the settlement extends only to so much of the property as will raise the rent-charge of £300 a year; and the question is, did the will operate as an exercise of the power? If it did, the Petitioner takes (by survivorship) one-half of the rent-charge property, as well as one-half of the residue: *i. e.*, he takes one-half of the whole estate in fee, subject to the rent-charge, with an executory devise over to his sisters in the event of his dying without issue; and a power of jointuring his widow. Each sister takes one-sixth of the rent-charge property, and one-sixth of the residue, with an executory devise over to her brother and sisters and the survivors or survivor of them, in the event of her dying without issue.

If the will did not operate as an exercise of the power, the rent-charge property goes in fourths amongst the Petitioner and his sisters absolutely.

The interest of the Petitioner is to support the former contention.

Mr. *Speed*, for the trustee.

Mr. *W. W. Cooper*, for the three daughters:—

The language of the will is such as to shew that the testator was

dealing only with his "own" property. Where a testator describes the property he is giving as "the whole of my property," the gift cannot be held to extend to property over which he has only a power of appointment.

Here also he vests the property he is giving in a trustee with a power of sale—which is wholly inconsistent with the power of appointment.

The words "my property" are well satisfied by the *Tilton* farm, less the rent-charge portion of the estate; *Sugden* on Powers (1); *Evans* v. *Evans* (2), referring to *Jones* v. *Curry* (3).

Mr. *Hall*, in reply:—

In this instance all the defendants have to rely on to shew that the testator did not mean to pass the whole of his estate is the use of the words "my property." But the testator goes on to give a specific description of what he had before described generally; and in that specific description is included this very farm of *Tilton*. His idea is not very clearly expressed, but there is enough to shew he had a notion that there was something coming to him under his marriage settlement, and that something he certainly wished to dispose of.

Sir James Bacon, V.C.:—

I cannot decide this case in favour of the Petitioner without going against the authorities.

This gentleman at the time when he made his will was seised of the whole of this estate, and I presume was also in possession of it. The £300 rent-charge did not arise till his death; but to the extent of the hereditaments which were required to raise the £300 rent-charge, the farm at *Tilton* was not the testator's property, whatever he may have thought.

I think he cannot be considered, by using the words "my property," to have intended to deal with property over which he had only a power of appointment, when there was property of his to which the words, giving full effect to them according to the terms of the will, exclusively of the settlement, would apply.

(1) 8th Ed. p. 325. (2) 23 Beav. 1. (3) 1 Sw. 66.

V.-C. B. 1871 WILDBORE v. GREGORY.

I agree in the rule that the intention must be collected from the face of the will. The will must speak for itself; and the result will be, that the limitations of the settlement dealing with the £300 a year property will remain.

I think the son is entitled to exercise an option of retaining possession of the farm, and to be allowed twelve months within which to exercise his discretion.

The costs of all parties, as between solicitor and client, will come out of the estate.

Solicitors for the Petitioner and the Defendants: Messrs. *J. & J. K. Wright.*

Solicitors for the Trustee: Messrs. *Taylor, Hoare, & Taylor.*

V.-C. B. 1871 *June* 3.

In re WILLIAMS' ESTATE.

Statutory Jurisdiction—Local and Personal Act prior to Lands Clauses Act, 1845—*Court of Exchequer—Transfer and Payment out of Court of Chancery —Costs.*

7 Ch D. 185.

Purchase-money had been paid into the Court of Exchequer by a company incorporated under an Act prior to the *Lands Clauses Act*, which provided that the Court should have power to order the "costs of all purchases," together with "the necessary costs of obtaining such order," to be paid by the company.

The costs of a Petition praying for the payment of the dividends of the investments of the purchase-money to a tenant for life, had been ordered by the Court of Exchequer to be paid by the company:—

Held, that the Court of Chancery had no power to order the costs of a Petition for transfer of the fund and payment out of the dividends to a person beneficially entitled, to be paid by the company.

PETITION.

The *Llanelly Railway and Dock Company* were incorporated by an Act of the 9 Geo. 4, c. xci., with powers to purchase and hold land for the purposes of their undertaking; and it was provided (sect. 96), that all purchase-moneys under £200 for lands belonging to persons under disability might be paid either into the Bank in the name of the Accountant-General of the Court of Exchequer to his account, *Ex parte The Llanelly Railway and Dock Com-*

pany, or to two trustees as therein mentioned; and should when so paid in there remain until, by an order of the said Court upon Petition, applied either in the purchase or redemption of the land tax, or in or towards the discharge of any debt or debts or other incumbrances affecting the same hereditaments or other hereditaments standing settled therewith, as the Court should authorize, or until the same should, upon like application, be laid out by order of the Court in the purchase of other hereditaments to be settled to the same uses; in the meantime the moneys to be invested; and it was thereby (sect. 100) further enacted, that "where by reason of any disability or incapacity of the person, or persons, or corporation, entitled to any lands, tenements, or hereditaments to be purchased, taken, or used under the authority of this Act, the purchase-money for the same shall be required to be paid into the *Bank of England*, or to be applied in the purchase of other lands, tenements, or hereditaments to be settled to the like uses, in pursuance of this Act, it shall be lawful for the said Court to order the expenses of all purchases from time to time to be made, in pursuance of this Act, or so much of such expenses as the said Court shall deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the said company out of the moneys to be received by virtue of this Act; who should from time to time pay such sums of money for such purposes as the said Court shall direct."

By two subsequent Acts of the 3 & 4 Will. 4, c. lii., and 5 & 6 Will. 4, c. xcvi., the powers of the company were enlarged and extended.

Certain lands settled to the use of *William Williams* for life, remainder to the use of his wife *Jane Williams* for life, remainder to the use of the first son of *William Williams* and the heirs of his body, were, in or about the year 1840, taken by the company. The purchase-money, amounting to £65, was paid into the Court of Exchequer; and by an order of that Court dated the 11th of May, 1840, made upon the Petition of *Jane Williams* (*William Williams*, her husband, having died), it was ordered that the Accountant-General of the Court should invest the sum of £65 in Bank Annuities, and carry them to an account to be entitled "*Ex parte The Llanelly Railway and Dock Company*, the Life

V.-C. B. 1871 *In re* Williams' Estate.

Account of *Jane Williams,*" and should pay the dividends to her for life; and the company were ordered to pay the costs of the application.

This was accordingly done; and afterwards, under the Act of 5 Vict. c. 5, the fund was transferred to the Accountant-General of the Court of Chancery.

In the year 1853 was passed the *Llanelly Railway and Dock Act,* 1853 (16 & 17 Vict. c. clxix), incorporating (amongst others), the *Lands Clauses Act,* 1845. By this Act the above-mentioned statutes of the 9 Geo. 4, and the 3 & 4 and 5 & 6 of Will. 4, were repealed (except as to certain portions); but it was enacted (sect. 8), that notwithstanding such repeal the company should continue incorporated; and (sect. 11) that notwithstanding such repeal "all purchases, sales, conveyances, leases, deeds, appointments, contracts, agreements, mortgages, bonds, covenants, and securities made or entered into before the commencement of this Act, to, with, in favour of, or by, for, or on behalf of the company or any person on their behalf, shall be and remain as good, valid, and effectual in favour of, against, and with reference to the company, and may be proceeded on and enforced in the same manner to all intents and purposes as if this Act were not passed."

Jane Williams died on the 20th of March, 1870, and this Petition was presented by *John Howells Williams,* the first son of *William Williams,* and executor of *Jane Williams,* praying that the fund might be transferred and paid to the Petitioner, he undertaking to pay and apply such part of the cash as belonged to the personal estate of *Jane Williams;* and that the company might pay the costs.

The only question was as to the costs.

Mr. *Freeling,* for the Petitioner:—

The practice of the Court of Exchequer was to order payment of the costs of a Petition praying for an absolute transfer and payment out; and that practice has, in some instances, been followed by this Court, as in *In re Robertson* (1) and *In re Tiverton Market Act* (2).

(1) 23 Beav. 433. 3 Jur. N.S. 784 (2) 26 Beav. 239.

V.-C. B.
1871
In re WILLIAMS' ESTATE.

The attention of the Court should nevertheless be directed to *In re Land's Trust* (1), where the words were the same as here.

Mr. *Method*, for the Company.

SIR JAMES BACON, V.C.:—

It is impossible for me to decide against the authority of the Lord Chancellor in the case that has been cited; where the practice is treated as settled.

The language of the Act of Parliament is reasonably plain. It is as follows:—[His Honour read the clause.] As far as they go, I think the words are against the Petitioner, and I do not think the decisions that have been cited of the Master of the Rolls are against the conclusion to which I have arrived.

The Petitioner will take his money; but without costs.

Solicitors: Messrs. *Vizard, Crowder, & Co.*; Messrs. *Markby & Tarry.*

MAGRATH *v.* MOREHEAD.

V.-C. B.
1871
July 7.

Will—Construction—Executory Trust.

Testator, by his will, directed his property to be divided into nine shares, and gave one and a half share to each of his two daughters, "to be settled on themselves at their marriage." At his death, the two daughters were infants.

The two daughters having attained twenty-one, and being unmarried:—

Held, that they were entitled to their shares absolutely, and that there was no trust for a settlement which the Court could execute.

ANDREW NICHOLSON MAGRATH made his will, dated the 12th of October, 1860, which, after a specific devise of real estate, was (so far as is material) in the words and figures following:—"I hereby leave the whole of the proceeds of my property of every description to my wife *Caroline Maria* during her life, except £200 per annum, which I leave to my sister *Mary Geraldine Magrath* during her life. My property I wish to be divided into

(1) 4 K. & J. 81.

V.-C. B. 1871 MAGRATH v. MOREHEAD.

nine shares; one share I leave to each of my six sons, and one and a half shares to each of my two daughters, the latter to be settled on themselves at their marriage;" and the testator appointed his widow and *William Ambrose Morehead* executors of his will.

The testator died on the 27th of December, 1860, leaving two infant daughters, *Caroline Charlotte Louisa* and *Mary Catherine Emily;* and on the 25th of February, 1861, his will was proved by his widow. She died on the 10th of March, 1861; and the will was again proved by *William Ambrose Morehead* on the 23rd of November, 1861.

On the 1st of December, 1863, *William Ambrose Morehead* died, having by will bequeathed to *Catherine Morehead, Raynham William Stewart,* and *Charles Morehead,* all estates and property vested in him at his decease upon any trust, and having appointed *Catherine Morehead* and *George Jeffrey Morehead* his executors, both of whom proved his will.

In October, 1864, *Caroline C. L. Magrath* attained twenty-one. Applications were made by her, on her own and her sister's behalf, for a statement of the securities in which the moneys representing their shares were invested; and finally, on the 26th of October, 1869, this bill was filed by Miss *Magrath* and her sister *Mary,* then an infant, against the executors of *W. A. Morehead,* praying, amongst other things, that the construction of the testator's will, so far as the same related to the shares of the property thereby bequeathed to his two daughters, the Plaintiffs, might be declared, and the trusts carried into execution by and under the direction of the Court; that if, in the judgment of the Court, the Plaintiff *Caroline C. L. Magrath* was entitled to an immediate transfer of her share of the property, the same might be transferred to her accordingly; and if not, that proper provision might be made for securing the same; also that the shares of the Plaintiff *Mary C. E. Magrath* might be ascertained and secured for her benefit.

Since the filing of the bill, Miss *Mary C. E. Magrath* had attained twenty-one. Both ladies were unmarried.

The sole question was, whether they were entitled to their shares absolutely, or whether the Court would require the shares to be settled.

Mr. *Holmes* (Mr. *Bristowe*, Q.C., with him), for the Plaintiffs:—

The Plaintiffs are entitled to a transfer of their shares to them absolutely.

The expression in the will is not sufficiently direct or precise to raise an executory trust.

Mr. *Fischer*, for the Defendants:—

The shares of the Plaintiffs ought to be settled.

The testator's intention is sufficiently shewn, and the form of settlement is well established by the practice of the Court: *Loch* v. *Bagley* (1); *Jervoise* v. *Duke of Northumberland* (2); *Hulme* v. *Tenant* (3); *Lyddon* v. *Ellison* (4).

SIR JAMES BACON, V.C.:—

I think that the words of this will clearly import an absolute gift to the daughters. I do not find any gift over, any reference to grandchildren, or any intimation in the language of the will of an intention on the testator's part to restrict the gift to a life interest.

The circumstance that at the date of the will the daughters were infants, is sufficient to account for the use of the words referring to a settlement at marriage.

I must therefore declare that the Plaintiffs are entitled to have their shares paid and transferred to them absolutely.

The costs of all parties, as between solicitor and client, will come out of the general residue.

Solicitor for the Plaintiffs: Mr. *B. F. Watson.*

Solicitors for the Defendants: Messrs. *Cox & Sons.*

(1) Law Rep. 4 Eq. 122.
(2) 1 Jac. & W. 559.
(3) 1 Bro. C. C. 16.
(4) 19 Beav. 565.

V.-C. B.

1871

July 15.

In re THAKEHAM SEQUESTRATION MONEYS.

Church Discipline Act, 3 & 4 *Vict. c.* 86—*Suspension of Clerk for Misconduct—Sequestration—Right to the Proceeds of Sequestration.*

Where a living is vacant by reason of the suspension of a clerk under sentence founded on proceedings under the *Church Discipline Act*, and the proceeds have been sequestrated, the fruits of the sequestration belong to the bishop, as chief pastor of the church, subject to the duty of providing for the services.

PETITION.

In May, 1844, the Rev. *John Hurst*, rector of *Thakeham, Sussex*, was, by a decree of the Court of Arches, in a suit intituled "The Office of the Judge promoted by *Trower* v. *Hurst*" (1), suspended, for misconduct, from performing divine service, and from enjoying the profits and emoluments of the rectory, for three years. (The decree will be found printed at length in *Coote* on the Ecclesiastical Courts (2).

In pursuance of the decree, letters of sequestration were issued out of the registry of the then bishop of *Chichester* (Dr. *Ashhurst Turner Gilbert*) to *Joseph Butler*, as sequestrator, in the usual form (see *Cripps* on the Clergy) (3); and in 1856 the living of *Pett*, in the same diocese, was also sequestrated under similar circumstances.

The profits and emoluments of the two livings received by the sequestrator were paid into the bank of Messrs. *Dendy & Co.* at *Chichester*, and were there carried to an account called "The Bishop of *Chichester*, *Thakeham* Account;" and out of this account were paid from time to time the curates' salaries, rates, taxes, and other outgoings of the rectories. A balance remained then amounting to about £860.

In the year 1850 a correspondence took place between *George Gibson*, Esq., a resident in *Thakeham* parish, and the then bishop, on the subject of the application of the moneys. In the course of this correspondence the bishop said he should be glad to contemplate the employment of the money towards building and endowing

(1) 1 Rob. Ecc. 597. (2) Page 248. (3) Page 657.

a school for the parish, as an object to which, with the co-operation he might hope for, he might begin to take measures to apply the fund. He thought it would not be right to mitigate to Mr. *Hurst* the consequences of his misconduct by applying it to the repairs of the church and buildings, which must be supported by the rector. In another letter, in 1851, the bishop said he looked for contributions towards a fund for the site and building of the proposed school from the parish, together with the assistance of the diocesan and national societies, and of the Privy Council. In a third, he observed that Mr. *Hurst* had "refused the payment of the rent-charge of his own farm and withheld possession of the glebe, and that it was in endeavouring to carry out the sentence of the Court against him on these points, and which attempts failed, that a large portion of the law expenses was incurred." In another letter, in December, 1851, his Lordship said: "I have not the least expectation that the societies or the Privy Council would, under your circumstances, give anything, for the reasons I stated. . . . So that the question on that head reduces itself to one, in my opinion at least, of what the landowners and occupiers of *Thakeham* itself, with their own immediate friends, will do towards providing a schoolroom and residences for a master and mistress. When this is effected in a manner sufficient in my judgment, and the tenure and management secured in what I may deem a proper way . . . I will be ready to transfer the fund in my hands as an endowment, but not until the buildings are erected, paid for, and transferred." Writing again in January, 1852, the bishop concluded: "Still, if you succeed" (*i. e.*, in getting funds for the site and building), "I approving of the form, &c., of the school and house, and of the legal provisions for the tenure and management of the school, I will, when all is completed, make over the £552" (the then amount) "as an endowment fund."

The late bishop died in February, 1870, having appointed *Robert Wintle Wintle* and the Rev. *Thomas Morrell Gilbert* his executors.

On the 18th of April, 1871, the partners in the *Chichester* bank filed an affidavit In the Matter of the *Trustees Relief Act*, and of the Sequestration Moneys of the Parishes of *Thakeham* and *Pett*, stating that they were desirous of paying into and depositing in Court to

V.-C. B. 1871 *In re* THAKEHAM SEQUESTRATION MONEYS.

the credit of the *Thakeham* account a sum of £262 0*s.* 5*d.* cash, and two exchequer bills for £500 and £100 respectively, and to the credit of the *Pett* account £104 2*s.* cash, and an exchequer bill for £100; and that there had been served on them a notice by Mr. *Hurst*, the rector, claiming some interest in the funds; a notice not to part with the funds by the churchwardens and overseers of *Thakeham;* and a claim by the executors of the late bishop to the whole fund.

They also stated as follows:—"The Right Rev. the present Bishop of *Chichester* has called at the bank of the deponents, and has informed the deponent, *Robert Dendy*, that he claimed both funds standing to the said two accounts; and that he desired the deponents to consider that he had from that date placed a '*moral distringas*' on those sums."

They shortly afterwards paid and deposited the funds in Court; whereupon the present Petition was presented by the executors of the late bishop, praying that the funds might be delivered up and paid to them.

Mr. *Hurst* deposed that the tithes of *Thakeham* were commuted at £710; and that the rent of the glebe was £100 a year or thereabouts. He further deposed as follows:—

"At and during the whole time that the said living was under sequestration, the sequestrator had not (as I believe), any power to distrain for the tithes payable to me as rector of the said parish; and shortly after the said sequestration was made, the Right Rev. *Ashhurst Turner*, the then bishop of *Chichester*, promised and agreed with me, that if I would not appeal from the aforesaid decree to the Judicial Committee of the Privy Council, or in any manner prevent the sequestrator from recovering the said tithes, he would, at the expiration of the time for which the said living was sequestered, pay me a portion of the surplus of the emoluments and endowments of the said living which remained after paying the costs of the proceedings in the Arches Court, and of the sequestration, and providing for the services of the said church and the other duties of the minister; and in consideration of such promise and agreement on the part of the said late bishop, I undertook and agreed not to appeal from the said decree, nor to obstruct the sequestrator in recovering and receiving the said tithes; which

undertaking and agreement on my part I strictly observed and performed, and the said sequestrator was thereby enabled to receive (as he in fact did) the whole of the said tithes during the three years that the said living was under sequestration as aforesaid."

He further said, that no account of the receipts and payments of the sequestrator were ever furnished to him, and he, until very recently, believed the emoluments had been entirely absorbed in paying costs, providing for the services of the church and the duties of the minister; and that any balance had been devoted by the late bishop to the building of a church near *Chichester*.

He also said that, in January, 1845, he paid to the Rev. *Charles Courtenay*, the then curate, in part payment of the first annual sum for performing such duties, a sum of £75 out of his own resources; and that during the sequestration no repairs were done to the chancel of the church or to the rectory-house; and by reason of such non-repair a considerable additional cost, amounting to £520 at least, was thrown upon the deponent.

He submitted that he was absolutely entitled to the exchequer bills—No. 244, for £500, and No. 3692, for £100—and to the sum of £262 0*s.* 5*d.* cash; or that he was, at any rate, entitled to be repaid thereout the £75 and £520.

Mr. *Hurst* had been served with notice to attend and be cross-examined on this affidavit; but he failed to attend, and excused himself on the ground of being laid up with an attack of gout.

The objection to the admissibility of the affidavit was not insisted on by the Petitioners' counsel.

Mr. *Kay*, Q.C., and Mr. *E. Leigh Pemberton*, for the Petitioners:—

The course pursued by the bankers is quite without precedent. The rights of the bishop in such a case are declared by the Court of Queen's Bench in the case of *Bunter* v. *Cresswell* (1). [They also referred to *Morris* v. *Ogden* (2) and *Pinder* v. *Barr* (3).]

(1) 14 Q. B. 825, 830: "The church being for the time in substance deprived of its minister, it is cast upon the bishop to provide for the temporary vacancy; and to enable him to do so, he is to receive the profits, not as when he receives them in the exercise of a writ from a temporal court, as a sort of sheriff, with a liability to account to the court for his receipts, but in virtue of his office of chief pastor, responsible to no one so long as the church is properly supplied."

(2) Law Rep. 4 C. P. 637.

(3) 4 E. & B. 105.

V.-C. B.

1871

In re THAKEHAM SEQUESTRATION MONEYS.

Mr. *Fry*, Q.C., and Mr. *Freeman*, for *Hurst*:—

Mr. *Hurst* is at liberty to claim any portion of the fund he pleases, short of the whole; at least he is entitled to his outlay.

No doubt the bishop is chief pastor; but suppose all the proceeds of the living are not required, can it be said that the balance belongs to this high officer of the church, whose predecessor issued the letters of request by virtue of which Mr. *Trower*, the rural dean, promoted the office of judge against the clerk? Is he to reap the benefit of having set the Court in motion? *Bunter* v. *Cresswell* (1) was a case of competition between two sequestrations. The case of *Morris* v. *Ogden* (2) does not establish the right of the bishop to reap a private profit from a sequestration.

Mr. *Kingdon*, for the churchwardens:—

The fund ought to be devoted to the benefit of the parish.

The *dictum* in *Bunter* v. *Cresswell* was extrajudicial. Is a bishop acting under the *Church Discipline Act* (3 & 4 Vict. c. 86) to be a judge in his own cause?

A sequestrator is liable to pay for the repairs of the chancel and parsonage: *Hubbard* v. *Beckford* (3).

The VICE-CHANCELLOR:—That was under a sequestration for debt.

Mr. *Kingdon*:—*À fortiori*, would it be so under a sequestration for misconduct. Dr. *Burn* says (4), that "by the common law of the church the profits of the vacation were to be laid out for the benefit of the church, or reserved for the successor." The late bishop himself earmarked this fund at the bankers.

Mr. *Woodroffe*, for the Bishop of *Chichester*.

Mr. *Alfred Smith*, for the bankers, asked for their costs.

SIR JAMES BACON, V.C.:—

It is you, the bankers, who have done all the mischief; it is your misconduct which has occasioned this absurd litigation.

(1) 14 Q. B. 825.
(2) Law Rep. 4 C. P. 687.
(3) 1 Hagg. Consist. 307, 312.
(4) 4 Ecc. Law, 1.

The matter seems to me very plain. About the right of the bishop there can be no doubt. It is very clear, and entirely covered by precedent. The principle is laid down in the case that has been cited of *Bunter* v. *Cresswell* (1), and a reason is there given for it. Mr. *Kingdon* says that that was an extrajudicial decision, and that the learned Judge (*Patteson*) who delivered the judgment of the Court in that case ought not to have gone so far. In my opinion, it was quite right and proper, if I may take the liberty of saying so in speaking of that judgment, that the Court should point out the rights of creditors claiming against the rights of the bishop under the second sequestration. The proceeds of the second sequestration belonged to the bishop or chief pastor of the church. How could it be otherwise? The reason is plain. The effect of the suspension of the clerk is to render the living vacant. All the duties of the vacant living have to be discharged by or at the cost of the bishop. The bishop may discharge these duties in his own person if he thinks fit, or he may provide a substitute. Suppose that he discharged them in his own person, could there be the slightest doubt as to his title to the proceeds? The bishop, and the bishop alone, is entitled to the sequestrated profits of the living, subject only to the duty which is thrown upon him of providing for the services of the church.

The notion that the churchwardens of the parish have some claim upon the proceeds is one which the Court cannot entertain for a moment. They have no right to claim at law, still less are they entitled in this instance to set up any agreement with the late bishop.

Mr. *Hurst's* claim is the only thing that remains to be considered. To the evidence which he has given I cannot pay any serious attention. He sets up an agreement with the late bishop that he was to have a portion of the emoluments of the living on certain terms, namely, that he was not to appeal from the decree, and not to interfere with the sequestrator. But the reported case (2) shews that Mr. *Hurst* did most effectually interfere with the sequestrator. Sir *H. J. Fust* was of opinion that an agreement had been made out whereby the relation of landlord and tenant was established between the sequestrator and Mr. *Hurst*. He

(1) 14 Q. B. 825. (2) 1 Rob. Ecc. 597.

V.-C. B. 1871 *In re* Thakeham Sequestration Moneys.

said (1): "The case becomes one rather of non-payment of rent than of receiving or keeping to himself strictly the profits of the living." But this at least is clear, that Mr. *Hurst* resisted payment of the profits of the glebe to the sequestrators.

There is another ground on which I cannot give any effect to this alleged agreement—namely, that I cannot tell what "portion" of the surplus emoluments is supposed under such agreement to be Mr. *Hurst's*. Besides, Mr. *Hurst* has for more than twenty years been in receipt of the proceeds of this living, and has during that time made no claim; and how does he account for the delay? He says he thought until lately that the balance of the emoluments had been devoted by the bishop to the building of a church near *Chichester*—a proceeding which would have been a direct violation of such an agreement as he before alleges the bishop to have made. And the case thus made rests upon an affidavit not filed till after the late bishop's death, and when there is no possibility of an explanation of what arrangement, if any, took place between him and the late bishop. Then he claims to have an allowance made to him in respect of the £75 which he says he paid to Mr. *Courtenay*. But Mr. *Hurst* may have paid that sum to Mr. *Courtenay* at the time of his suspension and yet have paid no more than was due to him before the date of the sequestration.

The only thing, then, remaining to be disposed of is the question of dilapidations. In this respect Mr. *Hurst* has not for twenty years made any claim. I do not say that he ever could have done so; but if he ever could, it is plain he should have done so within a reasonable time after he was restored to the proceeds of the living, and, at any rate, in the lifetime of the late bishop.

It is clear to me that the moneys lately standing at the bankers belonged to the bishop, and to no one else; and I hold that the representatives of the late bishop are now entitled to the fund.

As for the conduct of the bankers in paying the money into Court, if I could make them pay the costs occasioned by their so doing I would do so. As it is, I give no costs to any one.

Mr. *Woodroffe* asked for the costs of the Bishop of *Chichester*,

(1) 1 Rob. Ecc. 603.

The VICE-CHANCELLOR:—You must have recourse to your "moral *distringas*." I give you no costs.

V.-C. B. 1871 *In re* THAKEHAM SEQUESTRATION MONEYS.

Solicitor for the Petitioners: Mr. *Girdlestone.*

Solicitors for the several Respondents: Messrs. *Senior, Altree,* and *Johnson,* agents for Mr. *Mant, Storrington;* Messrs. *Palmer, Palmer, & Bull,* agents for Mr. *Lear, Arundel;* Messrs. *Robinson & Preston.*

In re ORIENTAL COMMERCIAL BANK.

V.-C. B. 1871 *July* 26.

Contract of Indemnity—Bills of Exchange.

Bills of exchange were accepted by the *A. Company* for the accommodation of *B. Company,* upon an agreement that funds should be provided by *B. Company* to meet the bills at maturity. The bills were discounted, but before they arrived at maturity companies *A.* and *B.* had both stopped payment, and the bills were dishonoured. *C.*, the holder of the bills for value, recovered the amount due upon them by proofs against companies *A.* and *B.* under their respective windings-up:—

Held, that *A. Company* was entitled, under the contract of indemnity, to stand as a creditor against *B. Company* for the amount that had been recovered from them by *C.* as holder of the bills.

Reversed by L.J. 2 R.7 Ch 99

ADJOURNED SUMMONS upon a claim by the official liquidator of the *European Bank* to stand as creditor against the *Oriental Commercial Bank* for a sum of £4402 0*s.* 9*d.*

In 1866 bills of exchange were drawn by correspondents of the *Oriental Bank* upon the *European Bank,* and accepted by the *European* for the accommodation of the *Oriental,* upon the understanding, as stated in a letter from *Pappa,* the manager of the *Oriental,* that they would furnish the *European* with funds to meet the bills at maturity. The bills (for £8800) were accepted by the *European,* and handed to the *Oriental* as agents for the drawers, who thereupon discounted the bills with the *Agra Bank.* When the bills became due all three banks had stopped payment, and were in process of liquidation, and as no funds had been provided to the *European,* the bills were dishonoured. The *Agra Bank,* by whom the bills were held for value, proved as creditors against the estate of the *European Bank* for £8804 1*s.* 6*d.*, the amount due

V.-C. B. 1871 *In re* Oriental Commercial Bank.

upon the bills, including notarial charges, and had received dividends upon their claim amounting to £4402 0s. 9*d.* They had also proved against the estate of the *Oriental Bank* and received such a sum as would pay them in full the balance remaining due on the bills.

The liquidators of the *European Bank* now sought to be admitted to prove against the *Oriental Bank* for the sum of £4402 0s. 9*d.*, which they had been compelled to pay through the breach of the agreement by the *Oriental* to provide them with funds for meeting the bills at maturity.

Mr. *Eddis*, Q.C., and Mr. *Graham Hastings*, for the liquidators of the *European Bank*:—

The bills were accepted on the understanding that before they arrived at maturity a sum sufficient to meet them should be lodged with the acceptors, and that the relationship of debtor and creditor never should exist between us and the *Oriental.* The case, therefore, turns upon the special contract, and not upon the ordinary relationship of debtor and creditor: *Prehn* v. *Royal Bank of Liverpool* (1); and we are entitled to recover from the *Oriental* the sum which we have been compelled to pay the *Agra Bank.* In *In re British and South American Steam Navigation Company* (before the Master of the Rolls, March 7, 1868), a claim of the *European Bank* under exactly similar circumstances was admitted to proof by the Master of the Rolls to the extent of the money paid by the *European.*

[They also cited *Loder's Case* (2), *Johnson* v. *Peck* (3), *Brown* v. *Stoddard* (4), and *Stephens' Claim* (5).]

Mr. *Jackson* (Mr. *Kay*, Q.C., with him), for the liquidator of the *Oriental Commercial Bank*:—

It is sought to fix the *Oriental* with a double liability, first, on the bills to the holders; and, secondly, on the contract with the *European;* but we cannot be called upon to pay the same debt twice over, which would be the result if the *European* were en-

(1) Law Rep. 5 Ex. 92.
(2) Law Rep. 6 Eq. 491.
(3) 3 Stark. 66.
(4) 10 Met. 375.
(5) Law Rep. 3 Ch. 753.

titled to recover from us without reference to what we have already paid upon the bills. The *European* are not entitled, in any case, to more than the dividend which has been received by the other creditors, and we are willing to admit them to prove for the whole amount of the bills, on deducting what has been already paid upon them by us to the holders.

SIR JAMES BACON, V.C.:—

I entirely abide by the decision of the Master of the Rolls in the case of the *British and South American Steam Navigation Company*. Everything that has been urged on behalf of the *Oriental Bank* by Mr. *Jackson* was, no doubt, pressed upon the Master of the Rolls in that case. The bills were accepted by the *European Bank* upon the faith of a contract with the *Oriental* that they should be provided with funds to meet the bills at maturity. That contract has been entirely broken, and the *European* has had to pay £4402. With the bills they had nothing to do. They performed their part by accepting them, and thereupon the *Oriental Bank* send the bills into the world with their indorsement, get the money, and now assert that they are not liable to the *European*. The contract of indemnity on which the *European* now seek to recover here is, a special and separate contract, distinct from that on the bills which has been satisfied, the holder of the bills having got his money where he could. In this respect *Prehn* v. *Royal Bank of Liverpool* (1) has direct bearing. Damage has been sustained by the *European Bank* on their contract of indemnity; they are entitled to prove for the amount of that damage.

Solicitors: Messrs. *Uptons, Johnson, Upton, & Budd;* Messrs. *Argles & Rawlins.*

(1) Law Rep. 5 Ex. 92.

V.-C. B.
1871
June 12.

8 Ch 707

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION.

Companies Act, 1862—*Reconstruction—Rights of Majority—Arbitration—Costs—Voluntary Winding-up.*

In sanctioning a scheme for the reconstruction of a company under liquidation, by a transfer of its assets to a new company to be formed for the purpose, the Court will have regard to the wishes of a majority of the shareholders and creditors deliberately expressed upon full information fairly afforded to them as against the opposition of a dissentient minority; and although a dissentient shareholder cannot be compelled to accept shares in the new company, or the valuation put upon his interest by the official liquidator, if he will accept neither of these alternatives the price of his interest must be settled by arbitration, as provided by the *Companies Act*, 1862, s. 162.

Where no direct sum has been tendered by the official liquidator as the price of such dissentient shareholder's interest, the costs of the arbitration will not be at the risk of the shareholder, but will remain in the discretion of the Court.

Sect. 161 of the *Companies Act*, 1862, does not relate to a purely voluntary winding-up only, but includes a voluntary winding-up under supervision of the Court.

THIS was a motion on behalf of the committee, appointed in June, 1866, to represent the shareholders and creditors of the *Imperial Mercantile Credit Association*, for the purpose of obtaining the sanction of the Court to an agreement for the reconstruction of the association as the *Imperial Credit Company, Limited*, and that the same might be ordered to be converted into an actual agreement between the liquidators and the *Imperial Credit Company*, and that all proper directions for carrying the same into effect might be given.

The *Imperial Mercantile Credit Association* was incorporated in June, 1864, as a finance company, with a capital of £5,000,000, divided into 100,000 shares of £50 each, and was engaged in a very extensive business down to its stoppage on the 11th of May, 1866. On the 12th of May, 1866, a winding-up petition was presented. Resolutions were subsequently passed for a voluntary winding-up, and on the 26th of June, 1866, an order was made by Vice-Chancellor *Wood* continuing the voluntary winding-up under supervision.

At the date of its stoppage the liabilities of the association

amounted to £1,654,443 10*s.* 1*d.*, and its assets, irrespective of the amounts uncalled upon its shares, to a nominal amount of £5,397,946 17*s.* 3*d.*

At an extraordinary general meeting held on the 14th of June, 1866, five persons were appointed as a committee of supervision for the purpose of advising with the liquidators, and with full power to act on behalf of the shareholders and creditors.

With the exception of two sums of £95,000 and £50,000 borrowed by the committee from the *National Bank of Scotland* and from Mr. *Giles Loder* for the purposes of the winding-up, some credit balances in the books not claimed, and a claim upon the association not admitted (the whole not amounting to more than £7000), the creditors of the association had been paid in full. Calls had been made upon the shareholders, so that £27 10*s.* had been called up on the £50 shares. The assets had also been partially realised, but many of the larger items remained outstanding, as their immediate realisation would either have been impossible or have involved very large sacrifices.

Amongst such items were securities of the *London, Chatham, and Dover Railway Company* for £776,910 16*s.* 2*d.*, a claim against the *Italian Irrigation Company* amounting to £527,020, and the securities of a Welsh railway for £436,941.

It being considered that the assets remaining unrealised would be better realised by means of a working concern than by continuing the liquidation, meetings had been held at which a plan for the formation of a new company, which should take over the assets of the old company remaining unrealised, was approved by a large majority of the shareholders. In particular, at a meeting held on the 14th of July, 1870, at which 141 holders of 17,384 shares were present, an amendment "to continue the liquidation in its present modified form, or to realise the assets by sale or otherwise," having been rejected, it was resolved:—

(1.) That the plan for the formation of a new company embodied in the circular of the committee of liquidation of the 6th instant be, and the same is hereby approved of, subject to such modifications in the details as the committee may sanction.

(2.) That it be referred back to the committee to take all necessary and proper steps to carry the plan into effect.

V.-C. B. 1871 *In re* Imperial Mercantile Credit Association.

(3.) That the sum of £5000 be paid to the committee, accompanied by the best thanks of the shareholders, for their valuable services during the period of the liquidation.

The new company, which was called the *Imperial Credit Company, Limited,* had been registered with a memorandum and articles of association, which embodied certain articles of agreement under seal between the committee of supervision of the one part and the *Imperial Credit Company, Limited,* of the other part.

It is unnecessary to state in detail the terms of this agreement, under which the new company were to purchase the assets of the old company, further than that—1. Every contributory of the old company was to be entitled for each share in the old company to a share in the new company of the nominal value of £10, on which £7 10*s.* was to be taken as paid up (thus changing the remaining liability of £22 10*s.* on the old shares into a liability of £2 10*s.* on the new shares), and contributories accepting shares in the new company were to receive deferred liquidation certificates transferable by indorsement, expressing the right of the contributories or the holders to receive from the new company in cash the proper proportions of the surplus. 2. Contributories of the old company who did not accept shares in the new were to have the option of having the price of their respective interests settled by arbitration, as provided by sect. 162 of the *Companies Act,* 1862, and the value paid to them within one month after the award of the arbitrators, with an indemnity by the new company from all liability as contributories of the old company. 3. Those contributories of the old company who should not accept shares in the new company or require an arbitration were to have their respective proportional interests in the assets of the old company paid to them in cash as the same should from time to time be realised by the old company. With respect to the assents of the shareholders, it appeared that of the 100,000 shares in the capital of the *Imperial Mercantile Credit Association* there were—

(*a*) 834 persons holding 53,729 shares, on which the calls made had been fully paid up. Of these 834 persons, 590, representing 42,894 shares, had assented to the scheme.

(*b*) 80 persons holding 4452 shares, on which it was expected that the calls now owing would ultimately be paid off. Of these

80, 37 persons, representing 2531 shares, had assented to the scheme.

(*c*) The remaining 41,819 shares were formerly held by contributories who had compromised their liability, by surrendering their shares, or had become bankrupt, or not paid the amounts due from them, and their shares were not therefore taken into account. In the result, out of 58,181 shares held by 914 persons, assents had been given by 627 persons, representing 45,425 shares; and since the matter was brought before the Court in February last, additional assents had been obtained, raising the number to 695 persons holding 50,000 shares.

The scheme was objected to by Sir *Trevor Lawrence*, who, as the executor of the late Sir *William Lawrence*, was the holder of 680 shares (on which £18,700 had been paid), in which he was, together with his two sisters, beneficially interested.

His objections were thus stated:—

1. To being compelled to become a shareholder in a new finance company, and to be exposed to the risk of a further call and loss of £2 10*s.* per share on 680 shares.

2. That, according to the memorandum of association of the new company, no restriction whatever was placed upon the company embarking in new business; and that of the three courses proposed by the committee: (*a*) to realise the assets by sale and divide the proceeds, or to divide the assets in kind; (*b*) to continue the liquidation in its present or a modified form; (*c*) to arrange for the management and realisation of the assets by a working concern—the last having been recommended to the shareholders, their assent had been obtained on the faith of a statement, which did not mention that new business would be undertaken by such working concern. It was also objected by Sir *Trevor Lawrence* that the liquidation of the company, so far as it would involve any great expense, had been already, to all intents and purposes, concluded, and that the remaining assets might now be realised at a very small cost; that the amount already charged (and intended to be increased) by the liquidators and the solicitors was very heavy, and that the effect of the agreement would be to facilitate the admission of large claims against the company, while it was doubtful if they could or would be maintained if the winding-up were conducted

V. C. B. 1871

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION.

and concluded in the ordinary way. Objections were also taken to various clauses in the articles of association of the new company. In opposition to the application Mr. *Cannan*, the liquidator of the *Agra and Masterman's Bank* (which was the subject of a similar application before Vice-Chancellor *Wood*, in December, 1866), had made an affidavit, stating his conviction that had the old bank remained in liquidation, the old assets would have produced about £250,000 more than has been realised under the operation of the resuscitated bank, and that the shareholders would therefore have received back nearly £9 on account of each share, instead of £4 15*s.* actually repaid to them; and that as the bank shares were now selling at £2 discount, the total loss shewn to have resulted from the resuscitation upon old and new shares together would, at the present time, amount to about £450,000.

In order to meet some of these objections, the articles of association had been modified by striking out and altering the clauses complained of; and as to the power of embarking in new business, the new directors had given a pledge not to embark in any new business whatever without the consent of a meeting of shareholders, except such business as might naturally come out of, and be connected with, the realisation of the existing assets.

The committee of supervision, after taking into consideration the objections of Sir *Trevor Lawrence*, had put forward the following summary of their reasons for retaining their opinion that reconstruction would be the best thing which could be done in the interest of the shareholders:—

1. From the character of the remaining assets they require essentially time, perseverance, attention, and judgment for their development, and can be far better managed and realised by a working concern than under liquidation.

2. It will place the sole management and control of the affairs in the hands of representatives chosen by the shareholders, the only parties interested when the creditors are satisfied.

3. The shareholders who choose to exchange their shares for shares in the new company will get a transferable security bearing a dividend out of the income of the assets in lieu of a mere deferred interest in the result of the liquidation, which in the meantime is not saleable, whereas the new shares will have a more saleable

value, and those who wish to realise their interests will be able to do so.

4. Those shareholders who do not elect to join the reconstructed company are not obliged to do so; they can wait for the result of the liquidation and get all the benefits above mentioned, under 1 and 2, without incurring any of the supposed risks of joining the new company.

The case was originally brought on in February last, but after the matter had been partially argued it was suggested by His Honour that it should stand over in order that counsel might meet, and try to arrange the matter. In the result several of Sir *Trevor Lawrence's* objections had been removed, but as some remained the case was again brought before the Court.

Mr. *Fry*, Q.C., and Mr. *Westlake*, in support of the application, contended that the Court would not allow one single shareholder to stand in the way of the wishes of all or a large majority of his fellow-shareholders, and negative an arrangement which had received the sanction of such majority after full and proper disclosure of its nature. The Court, if satisfied that the interests of the minority would not be unduly prejudiced, had ample jurisdiction under the *Companies Act*, 1862, sects. 95, 131, 133, 138, and 161, to sanction a sale of the assets of the company in course of liquidation to a new company, in consideration of an allotment of shares in the new company: *In re Agra and Masterman's Bank* (1); *In re Anglo-Romano Water Company* (2); *In re South*

(1) 1866. Dec. 18. Before Vice-Chancellor SIR W. P. WOOD:—

In re AGRA AND MASTERMAN'S BANK.

THIS was a summons on behalf of the committee appointed at a meeting of the shareholders in this bank, held on the 18th of October, 1866, for the purpose of obtaining the sanction of the Court to the conditional agreement dated the 1st of December, 1866, for the resuscitation of the Indian portion of the business of the bank.

On the 7th of June, 1866, the *Agra and Masterman's Bank* stopped payment. On the 22nd of June a special resolution was passed for winding up voluntarily. On the 23rd of June an order was made for continuing the voluntary winding-up, subject to the supervision of the Court, and Mr. *Cannan* was appointed official liquidator.

In September a dividend of 5*s.* in

(2) Law Rep. 5 Ch. 437.

V.-C. B.
1871
In re IMPERIAL MERCANTILE CREDIT ASSOCIATION.

Barrule Slate Company (1); *In re Irrigation Company of France, Fox's Case* (2). The arrangement in this case was shewn to be very fair and reasonable, and the best mode of realising the assets of the

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the £1 had been declared. In October, meetings were held of the shareholders and creditors, at which it was resolved to resuscitate the Indian business by forming a new bank, to be called the *Agra Bank, Limited*, with a capital of £1,000,000, of which £400,000 was to be raised in 40,000 shares of £10 each, while the remaining £600,000 was derived from the surplus assets (estimated at that amount) of the *Agra and Masterman's Bank*, which were to be handed over as the basis of the arrangement. The creditors were to be paid by four instalments, at the first of which, in January, 1867, a dividend of 5*s.* in the £1 was to be paid to them in cash, while the other three instalments, extending down to October, 1868, were to be secured by promissory notes of the *Agra Bank*, with interest from the stoppage in June, 1866.

A prospectus of the new bank had been issued, and considerably more than the 40,000 shares had been subscribed for by *bonâ fide* applicants. On the 1st of December, 1866, an agreement embodying the terms of the proposed arrangement received the assent of a large majority of the shareholders and creditors. None of the shareholders had expressed their dissent to the proposed arrangement, and 689 out of 1256 (41,936 shares out of 60,000) had assented; no reply having been received from the remaining 5671, who held 18,000 shares. Of the creditors, 3816, whose debts amounted to £4,435,987, had assented; 1525 in the *United Kingdom* had sent no reply, while eleven, whose debts amounted to £144,000, dissented. There were 5914 creditors in *India*, *Australia*, and *China*, with debts of £1,876,250, from whom no reply had yet been received; but telegrams had lately arrived announcing that at meetings held at *Calcutta*, *Madras*, *Bombay*, *Kurrachee*, *Lahore*, and *Agra*, the proposed scheme for the resuscitation of the bank had been cordially accepted.

The official liquidator was prepared to pay a larger dividend in January next than was promised under the proposed arrangement.

Objections were raised by the opposing credtiors that the Court had no power, under the *Companies Act*, 1862, to sanction a sale of the assets of a company under liquidation for deferred payments secured merely by the promissory notes of the new company.

Sir *Roundell Palmer*, Q.C., Mr. *H. W. Cole*, Q.C., and Mr. *Westlake*, for the committee of shareholders, in support of the application.

Mr. *James*, Q.C., Mr. *Ferrers*, and Mr. *Langworthy*, on behalf of creditors for £20,000 and £26,000, supported the proposed arrangement.

Mr. *Druce*, Q.C., and Mr. *A. G. Marten*, for the creditors' representative, subject to certain alterations, did not oppose.

Mr. *Giffard*, Q.C., Mr. *Bedwell*, Mr. *Bevir*, and Mr. *G. O. Edwards*, on behalf of creditors for £111,000, £2198, and £110, opposed the application.

Mr. *Roxburgh*, Q.C., and Mr. *Fooks*,

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(1) Law Rep. 8 Eq. 688.

(2) Law Rep. 6 Ch. 176.

company, and had been adopted by the shareholders at successive meetings after full, honest, and complete disclosures to them of all particulars.

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for Mr. *Cannan*, the official liquidator, having regard to the interests of the 567 shareholders who had made no sign, and had not been as yet represented in the discussion, opposed the application.

SIR W. P. WOOD, V.C., in the course of his judgment, after stating that it appeared to him that he ought to sanction the proposed arrangement, made the following observations:—

Having arrived at this view of the shareholders with regard to the arrangement, and finding this very large preponderance in its favour, and this very small number of dissentient creditors, there is another duty, which is this: The Legislature has not handed over any of these companies to majorities bound hand and foot, certainly not to bare majorities. It has not handed them over even to very large majorities, who would be sufficient if the matter were out of Court (say two-thirds): it has not handed them over in that way even when the matter comes under the supervision of the Court. I apprehend the great advantage of having a voluntary winding-up under the supervision of the Court is this, so far as it has been an advantage at all, that there should be such control as that all persons are sure of having a fair hearing in Court of all the objections they may make, and having it more clearly considered than it can be in a crowded meeting of creditors, where they may not for a variety of reasons have the same opportunity of expressing their views as they have when they can be heard by counsel in Court, with due deliberation when every possible argument which has been considered fit by their advisers can be urged upon the Court. If the Court could see its way clearly and plainly to this result, that the body of the creditors, however small, were right in all their anticipations and conjectures, and the other body were wrong—for all these must be affairs of conjecture—then the Court would be bound to give effect to that conclusion. But at the same time it would be a very rash step on the part of the Court, as a matter of opinion—where it is but opinion against opinion, conjecture against conjecture, or speculation against speculation—to attempt to form an individual opinion as to what is thought right or wrong against the views of the very large body of those who are capable of judging and acting for themselves, and have formed a very decided opinion. In truth, the function of the Court seems reduced to seeing that everything has been fairly done and put before the creditors and shareholders, and that they have been informed of all that they ought to be informed of—that a decision has not been snatched by surprise, that there has been nothing which would induce the Court to say there has been either a surprise or fraud upon the persons sought to be affected by it, or that it is a case in which there ought to be a fresh investigation after the facts are known.

Then, again, I have been relieved very greatly by sect. 161, which tells people that when their company is being wound up voluntarily they may call a meeting together, and contemplates this very thing being done. Sect. 161 says that it may be very desirable to sell to a company and take shares in payment; and seeing that there might be some difficulty about that, says that any dis-

V.-C. B.

1871

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION.

Mr. *Higgins*, for Sir *Trevor Lawrence*:—

[The VICE-CHANCELLOR:—Two of the propositions which are made to you cannot, of course, be forced upon you. But you must satisfy me that the third, offering you a reference to arbitration under sects. 161 and 162, cannot be.]

Sect. 161 cannot be binding upon Sir *T. Lawrence*, as in express terms it is only applicable to the case of a company being wound up altogether voluntarily, where the voluntary winding-up

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sentients may come forward within seven days after the meeting, and state their dissent which they did not state at the meeting. If they have not voted at the meeting for the measure, thereupon they will be entitled to be paid, not in full, but to have a valuation made of their interest in the concern; and then sect. 162 provides for an arbitration like the *Companies Clauses Act* in cases of difference, so that the Legislature does contemplate the natural and obvious way of disposing of these bankrupt concerns by taking shares in another company, as a very beneficial mode of doing it. It appears to me that under sect. 95 I have ample power, because it says the official liquidator shall have power to do the following things:—[His Honour referred to the section.]

The official liquidator can sell the personal, heritable, and moveable property, objects and things, by public auction or private contract, with power to transfer the whole thereof to any person or company. I quite agree that transfer means after a sale. There must be a sale first. It is a sale to this company of all its outstanding assets in consideration of which they give their promissory notes for the payment of the amount of the whole debts, and give shares in their own concern paid up to a certain extent. The shareholders get the double benefit of the payment of the debts if this company is able to pay. Of course, like everything else, it must be speculation, but they get the benefit of having shares as regards any portion of the surplus. When it is said that this company will not be able to pay, how could any sale be ever made of everything? I agree with the remark made in argument that you could never sell, and be paid for, a large concern like this if it was expected that the whole consideration should be paid down in cash. The Legislature foresaw that it could not be so, and accordingly it introduced sect. 161 with reference to concerns winding up out of Court. Surely it was not intended, when the matter was before the Court, that the Court should have less power; on the contrary, it appears to me, by my reading of the statute, that the Court has more power, inasmuch as when they are doing things out of Court they are obliged to have a definite number and other arrangements of that kind. It appears to me the proposal is clearly in pursuance of the Act, and, that question of the absent members being disposed of, I think the Court is fully competent, when it has before it the evidence of such a general desire on the part of all persons interested, and is entitled to act upon that desire so expressed, provided it is clearly of opinion that the consent has been fairly and properly acquired.

has been properly conducted and regularly concluded, with due information to the contributories of every step taken, and full means of knowing their position. Sect. 161 must be taken in connection with sect. 136, and it supposes that everybody knows his position in the winding-up—what the debts are and what are the assets, and what are the liabilities. We object to the third alternative, of being driven to arbitration, until a complete statement of the financial position of the company has been produced. That has not been done. We have not had that full and sufficient information with which alone we could properly go before an arbitrator. We object to being bound by the mere informal statement of the liquidator without seeing the accounts, which have not been produced; and in particular, we object to the very large amounts proposed to be paid for compensation being allowed at the expense of the liquidation. And we now move, according to notice of motion, that the liquidators bring in their accounts, and that they be properly taken in Chambers, in order that we may know what is our position in this company before we are called upon to elect or to do anything in connection with this scheme of reconstruction.

[He referred to the *Companies Act*, 1868 (31 & 32 Vict. c. 68), s. 4; and upon the question of the liquidator's remuneration cited *Cannan's Claim* (1).]

[In the course of the argument the Vice-Chancellor said that Sir *Trevor Lawrence* should not go to the arbitration blindfold, and that he should have all proper materials necessary for making his claim and conducting his reference, and be furnished with all the information he was entitled to have if he went to arbitration.]

Mr. *Kay*, Q.C., appeared on behalf of the liquidators, but took no part in the argument.

SIR JAMES BACON, V.C.:—

It seems to me that the Act of Parliament is quite clear and plain. It is true that the Act of Parliament in the clause that has been referred to (sect. 161) speaks only of winding up voluntarily; but a voluntary winding-up under the supervision of the

(1) Law Rep. 7 Eq. 102.

V.-C. B. 1871 *In re* Imperial Mercantile Credit Association.

Court is not the less a voluntary winding-up. I cannot read this 161st section as enacting that it only relates to winding up voluntarily where the supervision of the Court has not been invoked; and if I read it in the way I propose, then it is the plainest thing possible, because the evidence establishes that the shareholders, who must be supposed in common sense and reason to have regard to their own interests, have come to a resolution for carrying on the business of the new company in the manner that has been mentioned. Then the Act of Parliament provides this, and this proviso overrides the sanction which the Court is to give to the new arrangement—"That if any member of the company being wound up, who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same, expresses his dissent from any such special resolution, in writing addressed to the liquidators, or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things, as the liquidators may prefer, that is to say: either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned." The liquidators have availed themselves of the power which is conferred upon them, not for their own benefit, but for the benefit of the whole society, and they do not abstain from carrying the resolution into effect, and they desire to purchase the interest of the one dissentient shareholder. Can anything be plainer? The 149th section directs that in all matters relating to the winding-up under supervision, as this unquestionably is, regard is to be had to the wishes of the creditors and contributories at the meeting.

The *Agra and Masterman's Bank* case seems to me entirely to cover all that there is of principle in this case, and to make it the duty of the Court to give effect to the resolution of the majority of the creditors (although "majority" is a word not found in the Act of Parliament), and the wishes of the creditors, so plainly expressed as they are here; and at the same time to see that so much justice is done to the dissentient shareholder as the Act of

Parliament says shall be the amount of his right and interest. I have no power to compel the dissentient shareholder to accept anything but that which the Act of Parliament prescribes. I think, since he dissents from the resolution which has been passed, and declines to accept either of the other alternatives offered to him, that he is bound by the Act of Parliament; and if the liquidator refuses to forbear carrying the resolution into effect, all that remains to be done is to ascertain the price that ought to be paid to the dissentient shareholder.

For the purpose of ascertaining that price, I am disposed to give the dissentient shareholder every facility he can require—all the information that he can require; and no sum having been at present tendered or offered to him as the price which the liquidator fixes as the value of his shares, I do not think the case is open to any of the danger of making it out at his peril, if he goes on with the arbitration; but that whatever costs may be incurred in the arbitration must be subject to the future decision of the Court. The demand that the accounts shall be brought in and passed, in my opinion, is one which I am not at liberty to accede to. It is covered by the resolution which has been passed by the great majority of the shareholders, and that must be taken as a fact accomplished—a thing done—a thing which the dissentient shareholder cannot undo or inquire into; and everything that has taken place there may be useful to him in estimating the amount of the price which he is entitled to receive. Sir *Trevor Lawrence* will have his costs of appearance upon the summons, but no costs of his motion.

Solicitors: Messrs. *Ashurst, Morris, & Co.;* Messrs. *Tatham, Curling, Walls, & Pym.*

V.-C. B. 1871 July 28.

In re DURHAM COUNTY PERMANENT INVESTMENT, LAND, AND BUILDING SOCIETY.

DAVIS' CASE.
WILSON'S CASE.

Benefit Building Society—Borrowing Powers—Unauthorized Application of Funds—Mortgage by Deposit.

6 Ch 859
14 Eq 446
23 Ch D 446, 9
44 C

1. The objects of a building society on the permanent principle, as stated in its certified rules, were to raise a fund for the purpose of enabling its members to purchase freehold land or other real or leasehold estate; to erect suitable cottages and other buildings thereon; to provide the means for the profitable investment of small savings; and in cases of accidental death to relieve the widows and families of deceased shareholders by adding the interest and estimated profits of the current year on the withdrawal of their shares at the time of death.

The rules contained no borrowing power, but in August, 1867, an alteration in the rules, giving the directors "power from time to time to borrow for the purposes of the society such sums and at such rates of interest and under such terms and conditions as they might think proper and expedient," was certified by the barrister:—

Held, that the borrowing power conferred by this altered rule was strictly limited to the purposes of the society as stated in the 1st rule, and that persons who had lent money to the directors, which was employed in a loan to another society, could not enforce their claim under the winding up of the society.

2. A loan to a building society was secured by the promissory note of the trustees, and by a deposit of the mortgage deeds executed by members of the society:—

Held (without deciding upon the right of the lender to enforce his security against the society), that the official liquidator was not entitled, without payment of the money advanced, to deprive the lender of his securities.

DAVIS' CASE.

THIS was an application under the winding-up of the *Durham County Permanent Investment, Land, and Building Society* on behalf of *Joseph Davis*, that his claim, for £100 deposited with the society, might be allowed, and payment made by the official liquidator.

The society was inrolled and certified in May 1862, as a building society on the permanent principle, the objects, as stated in the 1st of the rules, being to raise a fund for the purpose of

Appeal in Wilson's case dismissed on the ground that the parties had agreed to submit to the decision of the V.C.
W.N. (1871) 218. 19 W.R. 7 Ch. 457, 24 L.T.

enabling its members to purchase freehold land or other real or leasehold estate; to erect suitable cottages, dwelling-houses, and other buildings thereon; to provide the means for the profitable investment of small savings; and in cases of accidental death to relieve the widows and families of deceased shareholders by adding the interest and estimated profits of the current year on the withdrawal of their shares at the time of death. It was provided (Rule 28) that it should be lawful for the trustees, at the request of the board of directors, and they were thereby authorized, from time to time to lay out, invest, or dispose of any or all of such sums of money not required for immediate use, in accordance with 10 Geo. 4, c. 56, s. 13, in the proper names of such trustees, and from time to time to alter and transfer the same as might be most expedient.

Rule 29. "Whenever the money in hand shall be deemed by the board sufficient for the purpose, it shall be employed in advancing on mortgage security to the members, according to the amount of the shares held by them, and the board shall regulate the mode and manner for making the same, and all moneys not so employed shall be invested by the trustees in such lawful manner as the board shall direct. The board shall also have power to make special arrangements for advancing any amount upon mortgage security to be repaid by such instalments as may be agreed upon, notwithstanding the provisions herein contained."

The original rules contained no power whatsoever to the directors to borrow money for any purpose. The amended rules, certified on the 12th of June, 1863, also contained no such power; but at a special general meeting of the society, held on the 15th of August, 1867, certain additions to the rules were considered and resolved upon, including the following:—"The directors shall have power from time to time to borrow for the purposes of the society such sums, and at such rates of interest and under such terms and conditions, as they may think proper and expedient."

These alterations were certified as being in conformity to law, and within the provisions of 6 & 7 Will. 4, c. 32, by the certifying barrister.

On the 29th of January, 1868, *Davis* (and others) deposited with

V.-C. B. 1871

DAVIS' CASE.

the society the sum of £200, and received a receipt or deposit-note signed by the general manager in the following form:—

"*Durham County Investment, &c., Society.*

"*Sunderland,* 29th January, 1868.

"Received from Mr. *Joseph Davis* the sum of two hundred pounds as a loan to the above society, to bear interest at the rate of 5 per cent. per annum, but payable half-yearly, viz., in May and November.

"For the Trustees,

"*Samuel Woodhouse,* General Manager."

On the 1st of February, 1870, *Davis* drew out £100 of the £200 deposited by him with the society, and the receipt of this money was entered upon the deposit-note.

It appeared that the money thus borrowed upon deposit had been employed by the directors in the purchase of an estate at *Middlesborough,* and in loan transactions with the *Queen Building Society,* which had resulted in a heavy loss.

On the 6th of October, 1870, an order was made for winding up the society.

At the time of the commencement of the winding-up £15,000 was due in respect of moneys deposited with the society, and £10,800 to the bankers of the society and others, for moneys advanced to, or taken up at interest by, the society. The amount of subscriptions on the unadvanced shares was £21,148.

Mr. *Davis'* claim had been selected as a representative case for the purpose of determining the question whether the society had or had not power to borrow money.

Mr. *Eddis,* Q.C., in support of *Davis'* claim:—

First: The alteration in the rules of the society, giving borrowing powers after receiving the barrister's certificate, is valid and binding; and the regularity of the manner in which such alteration was made cannot be questioned for want of formalities: *Dewhurst* v. *Clarkson* (1).

Secondly: Assuming the validity of the alteration *modo et formâ,* the rule, as altered, is not *ultrà vires.* A borrowing power in the

(1) 3 E. & B. 194. 10 Jun 69.

trustees of a building society is not illegal under 6 & 7 Will. 4, c. 32, provided it is not unlimited in extent: *Laing* v. *Reed* (1). All that was decided in the *National Permanent Benefit Building Society, Williamson's Case* (2), and in the *Victoria, &c., Society, Hill's Case* (3), was, that a rule which authorized borrowing to an unlimited extent was illegal. So it is not illegal for a building society to invest their moneys in the purchase of freeholds: *Mullock* v. *Jenkins* (4); *Grimes* v. *Harrison* (5). The society cannot approbate and reprobate. The claimant was induced to deal with the society on the faith of the rule as altered, and on the footing that the borrowing was perfectly legal; and as the society has had the benefit of the money lent, the claim against the assets must be allowed: *In re Cork and Youghal Railway Company* (6); *In re German Mining Company* (7).

Mr. *Fry*, Q.C., and Mr. *Higgins*, for the official liquidator, were not called on.

SIR JAMES BACON, V.C.:—

The certifying barrister had nothing to do but to see whether there was any provision in the rules which offended against the law general, and then to see whether the requisitions of the Act of Parliament had been complied with. He found both, and his certificate is, to a certain extent, perfect and effectual; but it has no effect upon the question argued, viz., whether the powers which the directors thought they possessed under the rules enabled them to effect such a borrowing as they are now stated to have done; and this depends upon the constitution of the society. The rules of the society express very distinctly what the purposes of the society are. I use that expression, because the purposes of the society are those things to which alone the borrowing power, whatever it is, can be applied:—[His Honour, after stating the objects of the society, as declared by the 1st rule, continued:—] What power is there to sell or lend, or what purpose of the rules can be said to be comprehended within the lending the £8000 to

(1) Law Rep. 5 Ch. 4.
(2) Ibid. 5 Ch. 309.
(3) Ibid. 9 Eq. 605.
(4) 14 Beav. 628.
(5) 26 Beav. 435.
(6) Law Rep. 4 Ch. 748.
(7) 4 D. M. & G. 19.

V.-C. B. 1871 DAVIS' CASE.

the *Queen Society* or buying the *Middlesborough* estate? Such transactions are not within the scope of the constitution of the society. They might as well have betted upon the horses running at *Goodwood*, or done anything else that came into their heads. When you read the altered rules, assuming for the moment that they were validly passed, and free from technical objection, they authorize the directors from time to time to borrow, for the purposes of the society, such sums, and at such rate of interest, and under such terms and conditions, as they might think proper and expedient.

It is not because they have kept within the terms of that rule, giving it the utmost signification that can be contended for in fairness—it is not because they have acted within that rule that any complaint is made, but because they have wholly transgressed, and gone beyond the rule, and done something clearly contrary to that law. On no ground can it be said, as I conceive, for any rational purpose, that the directors, with such powers as are conferred upon them by these rules and regulations, had any right to borrow any sum of money which was not for the purpose of enabling the members of this society to purchase freehold land or other leasehold estate, or to erect suitable cottages or other buildings thereon, or the like. The purchase of the *Middlesborough* estate was not for the purpose of enabling the members of the society to build anything. The rules are very plain—to enable the members of the society, by the combined effect of their savings and what they obtain from the society, to do that which they might not possess capital enough to do for themselves, viz., to purchase freehold land to erect houses on for themselves, and for other useful purposes. The borrowing in this case seems a totally unauthorized act, and a transaction wholly illegal between borrower and lender.

The second point, which has some plausibility, was that, inasmuch as this amount, improperly borrowed and improperly invested, has been laid out in the purchase of land, the man who has lent his money has a right to follow it. There may be such a principle, but it would require very distinct evidence on the part of the person so claiming to prove that his £100 went into the purchase of any land. No such principle is applicable to this case.

The *German Mining Company's* case (1) and the *Cork and Youghal Railway Company* (2) were referred to, but they do not touch this case in the slightest degree. The principle upon which those cases were decided was that the company, being under an obligation to pay debts for which they might have been sued, had procured money which was applied in discharging those debts. But in this case the directors were under no obligation to enter into the transaction. They were under no liability. The principle of those cases, therefore, has no sort of application to this case. The purposes of the society were no nearer of accomplishment by this transaction; it turns out that they were rather defeated by it. It had nothing whatever to do with the only purpose for which this society was registered and constituted, and I am, therefore, of opinion that on neither ground can this claim be sustained.

WILSON'S CASE.

This case, which was argued at the same time as *Davis' Case*, came before the Court upon an application on behalf of the official liquidator, that the Rev. *William Wilson* might be directed within seven days to hand over to the official liquidator, without payment of any sum of money, the deeds deposited on the 20th of July, 1862, as a security for his loan of £200. 22 Ch D 667

In July, 1862, the Rev. *William Wilson* lent to the trustees of the *Durham County Permanent Benefit Building Society* the sum of £200, to be repaid with interest at 5 per cent.

On the occasion of this loan the following memorandum of deposit was given to *Wilson* by the society:—

"Memorandum.—We, *William Henry Hills, Thomas Scott Turnbull, Anthony M'Donald,* and *Joseph Ridley,* all of the borough of *Sunderland,* and trustees of the *Durham County Permanent Benefit Building Society,* established within the said borough, and who and their successors are hereinafter called 'The Trustees,' have borrowed of the Rev. *William Wilson,* of *Ryhope,* in the said county, clerk, the sum of £200 in trust for the said society, at interest on security of the promissory note of the said *A. M'Donald* and *J. Ridley,* trustees as aforesaid; and we have deposited with the

(1) 4 D. M. & G. 19. 16 Jur 710 (2) Law Rep. 4 Ch. 748.

V.-C. B. 1871 WILSON'S CASE.

said *William Wilson* the mortgage deeds mentioned in the schedule hereunder written, and the several other deeds and writings relating to the premises mentioned and set forth in the said schedule, as a collateral security for the payment of the said sum of £200, with interest after the rate of £5 per cent. per annum, payable half-yearly, clear of all deductions whatsoever: Provided, that if any member of the said society shall at any time be desirous of paying off and satisfying any security or securities given by him to the trustees which shall be in the possession of the said *William Wilson*, he, the said *William Wilson*, doth hereby agree that he will, on receiving security of adequate value, redeliver to the trustees all such mortgage and other deeds and writings relating to the property or properties intended to be discharged from such security or securities as aforesaid."

On the 6th of April, 1871, an agreement was entered into between the official liquidator and *Wilson*, by which *Wilson*, in order to enable the mortgagors to redeem the securities, agreed to hand over the deeds to the official liquidators if the mortgagor should be desirous of redeeming his security, and to join in any receipt or discharge for the mortgage-money. It was also provided that the rights of the parties thereto should be determined as they existed immediately before signing and entering into this agreement, and should be fully and finally determined in a summary way by the Judge acting in the matter of the winding-up.

The summons raising the question whether the society could effectually pledge the mortgage deeds of the members as a security for moneys borrowed was taken out by the official liquidator, and now came on together with that in *Davis' Case* (raising the question whether the society had power to borrow money).

Mr. *Fry*, Q.C., and Mr. *Higgins*, for the official liquidator.

Mr. *Caldecott*, for *Wilson*, was heard in opposition to the summons at the conclusion of Mr. *Eddis'* argument in *Davis' Case*:—

The certificate of the barrister is sufficient to prevent the society from setting up any informality in the passing of the resolutions to alter the rules: *Dewhurst* v. *Clarkson* (1). Both by

(1) 3 E. & B. 194, 210. 10 Jur 693.

the general law and by the special rules the object of the society is the lending of money to unadvanced members to the extent of their shares, and not beyond (Rule 29), and this implies a limited power of borrowing, which is not illegal: *Laing* v. *Reid* (1). As this is the only purpose for which the society could legitimately employ its funds, the lender is entitled to assume that the money borrowed will be so applied. Those that seek equity must do equity. The official liquidator cannot deprive me of my securities without first paying me what is due upon them. I make no claim; I am sitting on my securities, and decline to part with them until I have got back my money.

The VICE-CHANCELLOR:—Mr. *Wilson's* case is, in my opinion, totally different from *Davis' Case*. If the official liquidator had filed a bill to have the security returned, he could not get relief except on payment of the money which he confesses was advanced. He has no equitable right other than the society has; and on this summons he is seeking to assert a purely equitable right. This is how the case strikes me at present; but I will hear anything that may be said on behalf of the official liquidator.

Mr. *Fry*, Q.C., and Mr. *Higgins*, for the official liquidator:—

Wilson is not entitled to retain the deeds against the society. The society had no power to borrow, and the deposit of the deeds by the trustees, who had no power to pledge the funds of the society as a security for the loan, was an unauthorized proceeding, and as such the trustees, and not the society, are individually liable to Mr. *Wilson*: *Moye* v. *Sparrow* (2). Can it be said that *Wilson* was entitled to the whole benefit of the contract to the extent of receiving the subscriptions due from time to time? If a pledge such as in this case is to be held valid, the rule that there can be no unlimited borrowing power will be rendered altogether nugatory.

SIR JAMES BACON, V.C.:—

I cannot conceive that the official liquidator representing the whole of this society, members, trustees, and directors, has the right which he claims of getting back from this gentleman the

(1) Law Rep. 5 Ch. 4. (2) 18 W. R. 400.

V.-C. B. 1871 WILSON'S CASE.

deeds which have been deposited with him. There may be great difficulties in the way of Mr. *Wilson* in enforcing his security. Whatever they may be, I do not interfere with them now; but I have a very clear notion that the official liquidator could not, any more than assignees in bankruptcy, claim anything beyond that which the society he represents could claim. The memorandum of deposit is very clear in its terms. It is true he takes the personal security of the trustees—trustees, be it observed, acting (as the constitution of the society enabled them and the directors to act) for and on behalf of the society, and there is no trace of their having acted for themselves, or that their personal security was the principal and original cause of the loan, although the deposit of the deeds is called a collateral security. Nor do I see any difficulty upon the ground urged upon me, that the deposit of those deeds could not entitle the depositee to receive the subscription from time to time. It is quite clear it could not. The security made to him of the mortgage is only of the sum presently due. If by the default of the subscriber the mortgage could be extended so as to cover a large sum, so much the better for him while he holds the security, and so much the better for the society when they redeem the security. When the subscriptions are paid, as they are in ordinary cases, to the society, then no further debt would be incurred, and the amount of the mortgage would remain exactly the same as it was at the time of the deposit. I mean it, therefore, to be understood that, in dealing with this summons, I deal with it alone. I find the transaction one not likely to raise any suspicion in the mind of the man who lent the money. He did not inquire into circumstances. It was not necessary he should; he lent his money, and he took certain security. The agreement may be defective in a variety of ways, but the only question now is, whether, under the circumstances, I have authority to order Mr. *Wilson* to deliver up the deeds. I think I have no such authority. The case that has been referred to (*Moye* v. *Sparrow*) (1) is one of a totally different complexion, although many of the topics urged upon it have a very close analogy to what has been here said. It is to be observed there that the depositee, the mortgagee, as he called himself, was coming into Court to enforce

(1) 18 W. R. 400. W N (1874) 83

his rights; and not having possession of the deeds, and not having any such lien as Mr. *Wilson* possesses in this case, he asked to work out an equity against the bankers with whom they were deposited. I can find no resemblance between the two cases, so far as I am required to decide this case on the summons. I am of opinion, therefore, that the summons of the official liquidator must be dismissed.

V.-C. B. 1871 WILSON'S CASE.

Mr. *Caldecott* asked His Honour finally and effectually to determine the rights of the parties by ordering payment to *Wilson* of the £200.

The VICE-CHANCELLOR declined to interfere on behalf of *Wilson*, except to the extent of holding that the official liquidator could not wrest from him the deeds which he held.

Solicitors: Messrs. *Lewis, Munns, & Longden*; Messrs. *Davidson & Co.*

WILSON *v.* O'LEARY.

V.-C. B. 1871 *July* 21, 26.

Will—Two Codicils—Repetition of Legacies—Cumulative Gifts.

Where after a legacy has been given by one instrument, a legacy of equal, greater, or less amount is given to the same legatee by another instrument, they are *primâ facie* cumulative.

Consideration of the indications of intention required to rebut this construction.

Affirmed 6 L.J. 102 Ch 448

GENERAL SIR *DE LACY EVANS*, by his will, dated the 8th of September, 1860, after certain bequests, including an annuity of £80 to Mrs. *Anne Sleeman* for her life, legacies to his stepson *Philip Alexander Hughes*, to his nephews *John O'Leary* and *Henry O'Leary*, to Mrs. *Helen Passy* and each of her four sons, and to *Charles Reynolds Williams*, free of legacy duty, gave all the residue of his property to his two nephews *John* and *Henry O'Leary*, in equal shares and proportions.

The testator made a codicil, dated the 17th of June, 1867, which was in the words and figures following:—

"This is a codicil to the will of General Sir *De Lacy Evans*,

V.-C. B. 1871 WILSON v. O'LEARY.

G.C.B. I will and bequeath £4000 to my dear friend Colonel *Townshend Wilson*, late of the Coldstream Guards. I will and bequeath £2000 to General Sir *Richard Dacres*, R.A.; £2000 to Admiral Sir *Sydney Dacres;* £2000 to *John O'Leary*, of *Fort Shannon Glin;* £3000 to *Henry O'Leary*, of *New Zealand;* £500 to *Alexander Greig*, Esq., of *Lowndes Street;* £1500 to Mrs. *Mary Ann Sleeman*, natural daughter of my late uncle Major *Henry Evans*, long since deceased; £1500 to my excellent servant and friend *Samuel Smart* or *Smouth*, and an additional £500 if he should be with me at my death; a year's wages to every one of my servants; £2000 to *Deborah Warr*, my housekeeper, and the attached friend of my late dear wife."

Another codicil, undated, but alleged to have been executed in January, 1868, was as follows:—

"This is a codicil to the will of me, General Sir *De Lacy Evans*, G.C.B., which was dated September, 1860. I will and bequeath £2000 to my dear friend Colonel *Townshend Wilson*, late of the Coldstream Guards. I will and bequeath £1000 to General Sir *Richard Dacres*, R.A.; £1000 to Admiral Sir *Sydney Dacres*. I will and bequeath £500 to *Alexander Greig*, Esq., of *Lowndes Street Square;* £2000 to *John O'Leary*, Esq., of *Fort Shannon;* £3000 to *Henry O'Leary*, at present of *New Zealand;* £1500 to my excellent head-servant *Samuel Smart* or *Smouth*, and £500 extra if he shall be with me at my death; £1500 to Mrs. *Sleeman*, natural daughter of my late uncle Major *Evans*, of *Ganjam, India*. I bequeath a year's wages, liberally interpreted, to all my servants. I bequeath £2000 to my dear and valued friend, Captain *W. Eastwick*, of the Council of *India*. These shall be free of legacy duty."

The testator died on the 9th of January, 1870.

In addition to the two codicils set out, the testator left several other testamentary papers, and amongst them two codicils in a mutilated condition, with the signature torn off in each case.

On the 2nd of June, 1870, the Court of Probate granted probate of the will and the two codicils of June, 1867, and January, 1868.

A suit having been instituted for administration of the testator's estate, various questions arose as to the effect and construction of

the will and codicils; the principal one being, whether the legacies bequeathed by the two codicils to the same persons were cumulative or substitutional.

Mr. *Amphlett*, Q.C., and Mr. *Renshaw*, for the Plaintiffs.

Sir *Roundell Palmer*, Q.C., and Mr. *Everitt*, for General *Dacres* and Admiral *Dacres*:—

We contend that General *Dacres* and Admiral *Dacres* are entitled to both the £2000 and £1000 legacies given by the first and second codicils.

The rule is laid down in *Hooley* v. *Hatton* (1), that, where in different writings there is a bequest of equal, greater, or less sums, it is an augmentation, and the legatee will be entitled to both legacies unless the effect of the two separate gifts can be taken away by something to be found in the construction of the second instrument, or by presumption of law: *Lee* v. *Pain* (2); *Hurst* v. *Beach* (3). Even where the amount is the same in both gifts, the legatee has been held entitled to both: *Roch* v. *Callen* (4); and *à fortiori*, where the legacies are different in amount, the presumption is that both legacies were intended to take effect, and the onus is on those who seek to deprive the legatee of the benefit of the two gifts given by two different instruments: *Mackenzie* v. *Mackenzie* (5); *Guy* v. *Sharp* (6); *Suisse* v. *Lord Lowther* (7); *Robley* v. *Robley* (8).

Mr. *Eddis*, Q.C., and Mr. *Charles Hall*, for persons in the same interest:—

Where two legacies are bequeathed to the same person by different testamentary instruments, viz., the one by the will and the other by the codicil; or where they are given by different codicils, and the testator has given both of the legacies *simpliciter*, the Court, in such cases, in the absence of extrinsic evidence, considers that as the testator has given twice he must *primâ facie* be intended to mean two gifts; and it seems to be immaterial whether the legacies are of equal or unequal amount, or whether they are

(1) Tud. L. C. 313, 315, 3rd Ed.
(2) 4 Hare, 201.
(3) 5 Madd. 351.
(4) 6 Hare, 531.
(5) 2 Russ. 262.
(6) 1 My. & K. 589.
(7) 2 Hare, 424.
(8) 2 Beav. 95.

V.-C. B. 1871 WILSON v. O'LEARY.

of the same or different natures: *Roper* on Legacies (1). In *Tuckey* v. *Henderson* (2) it was held that gifts of different amounts to the same persons by two different instruments were substitutional; but, as pointed out by Vice-Chancellor *Giffard*, in *Cresswell* v. *Cresswell* (3), the second instrument there did not purport to be a codicil which, as observed by Lord *Romilly*, "is professedly an addition to a will." No intention whatever is expressed in this case of revoking the former instrument and substituting the second codicil for it. On the other hand, there are numerous indications that the second was intended to be an addition to the first. There are many broad distinctions between the two instruments. The *quantum* given is different; there are directions in the second not to be found in the first, *e.g.*, the year's wages are by the second "to be liberally interpreted:" the legacies in the second codicil are all given free of duty, and though the property of the testator had become increased, the legacies given by the second codicil are, in most instances, less in amount. Again, if the testator had intended merely to repeat, in an amended form, the legacies given by the first instrument, why did he leave out the legacy to *Deborah Warr*? On the other hand, it is not necessary that the testator should have expressed his intention to make the gifts contained in the second codicil additional to those in the first. "The law declares the second legacy to be cumulative, or added to the first; and there is no necessity to express what the law implies and declares. *Expressio eorum quæ tacitè insunt nihil operatur:*" *Johnstone* v. *Earl of Harrowby* (4).

Mr. *H. S. Milman*, for Mrs. *Sleeman* and *Alexander Greig*, referred to *Martin* v. *Drinkwater* (5), *Allen* v. *Callow* (6), and *Russell* v. *Dickson* (7), as cases in which the *primâ facie* presumption in favour of the legacies in the second instrument being additional had been rebutted by internal evidence of an intended substitution, and submitted that no such circumstances or evidence existed in the present case.

Mr. *Kay*, Q.C., and Mr. *Phear*, for the residuary legatees, ten-

(1) Page 999.
(2) 33 Beav. 174.
(3) Law Rep. 6 Eq. 69, 76.
(4) 1 D. F. & J. 183, 191.
(5) 2 Beav. 215.
(6) 3 Ves. 259.
(7) 4 H. L. C. 293.

dered an affidavit from Mr. *Stephens*, the solicitor of the testator, with respect to the second codicil, for the purpose of shewing that it was intended by the testator as a mere copy of the first, and submitted that evidence was admissible to shew the circumstances under which the testator executed the instrument: *Martin* v. *Drinkwater* (1); *Grey* v. *Sharp* (2).

Mr. *Eddis*, Q.C., said he would not insist upon any objection in point of form only to the admission of the affidavit, though it could not properly be read on further consideration; but he objected in substance, because the only question now before the Court was that of the construction of the particular instrument.

The VICE-CHANCELLOR admitted the evidence, observing that what it was worth when read would be a question to be decided.

Mr. *Kay*, Q.C., and Mr. *Phear*, upon the question of construction:—

Although, where a legacy is given to the same person in each of two different instruments, they are *primâ facie* to be treated as two gifts, there may be circumstances to shew that the *primâ facie* construction is not, in the particular case, the construction to be adopted; and very small circumstances have sometimes been acted upon as sufficient to take the case out of the general rules: *Russell* v. *Dickson* (3),—especially where the two gifts are not contained in a will and codicil, but in two codicils. We say that such circumstances are to be found in this case. The repetition of the gift of one year's wages to the servants is in itself conclusive against the legacies being cumulative. The same motive existed in both cases, and only one benefit can therefore be presumed to be intended. "The commentators on the civil law agree that where another legacy is given for the same cause, though in different instruments, there shall not be a double legacy:" *Duke of St. Albans* v. *Beauclerk* (4). Not only by the evidence of Mr. *Stephens*, but on the face of it, the second codicil is a pure, exact, and punctual repetition—in a revised form, with certain alterations—of the first, containing the same legacies, better expressed, and in the form in

(1) 2 Beav. 215.
(2) 1 My. & K. 589.
(3) 4 H. L. C. 293, 304.
(4) 2 Atk. 636, 640.

V.-C. B. 1871 WILSON v. O'LEARY.

which they were intended to take effect. In such a case, when, from comparing the form and expressions of the two, and from the general similarity of the gifts, an intention on the part of the testator to substitute the one legacy for the other can be gathered, the *primâ facie* presumption in favour of cumulation is rebutted, and it must be held that the latter gifts were intended not to be cumulative, but to be substituted for the former: *Moggridge* v. *Thackwell* (1); *Campbell* v. *Earl Radnor* (2); *Coote* v. *Boyd* (3); *Kidd* v. *North* (4); *Fraser* v. *Byng* (5); *Attorney-General* v. *Harley* (6); *Gillespie* v. *Alexander* (7); *Hemming* v. *Gurrey* (8); *Heming* v. *Clutterbuck* (9); *Jackson* v. *Jackson* (10); *Tatham* v. *Drummond* (11).

Sir *Roundell Palmer*, in reply, referred at length to Vice-Chancellor *Wigram's* judgment in *Lee* v. *Pain* (12), and in addition to the cases already cited, referred to *Ridges* v. *Morrison* (13); *Doe* d. *Hicks* (14); *Stokes* v. *Heron* (15).

Mr. *Eddis* was also heard in reply upon the claim of *Smart* to the legacies in both codicils, and also to his wages. He referred to *Suisse* v. *Lord Lowther* (16), *Roch* v. *Callen* (17), *Duke of St. Albans* v. *Beauclerk* (18).

July 26. SIR JAMES BACON, V.C. (after stating the question, and referring to the will and codicils, continued):—

To say that some degree of doubt and difficulty must attend all cases like the present, is only to repeat what has been often said and always felt by the Judges to whose decision such questions have been submitted. But whatever doubt there may be in any cases, the difficulty attending them is greatly diminished by

(1) 1 Ves. & B. 464.
(2) 1 Bro. C. C. 271.
(3) 2 Ibid. 521.
(4) 2 Phill. 91; 14 Sim. 463.
(5) 1 Russ. & My. 90.
(6) 4 Madd. 263.
(7) 2 S. & S. 145.
(8) Ibid. 311.
(9) 1 Bli. (N.S.) 479.
(10) 2 Cox, 35, 42.
(11) 33 L. J. (Ch.) 438.
(12) 4 Hare, 201, 240, 248.
(13) 1 Bro. C. C. 390, n.
(14) 8 Bing. 475, 479, 480.
(15) 12 Cl. & F. 161, 180.
(16) 2 Hare, 424.
(17) 6 Ibid. 531.
(18) 2 Atk. 630.

decisions which remain wholly unquestioned; for in several of such unquestioned cases rules have been laid down which guide and bind the Court, and the application of which, to whatever case may arise, is altogether imperative. Of the cases to which I refer, *Hooley* v. *Hatton* (1) is one of the most important, and from the clearness of the terms in which it is expressed, one of the most satisfactory. By the will in that case the testatrix gave to *Lydia Hooley*, "her woman," a legacy of £500. By a codicil, dated somewhat more than a year later, the testatrix said: "I add this codicil to my will. I give *Lydia Hooley* £1000." The question was, whether *Lydia Hooley* took the two legacies or only the last. The case having been decided by the Master of the Rolls in favour of the legatee, was re-argued, as it is said, "very much at large" before Lord Chancellor *Bathurst*, assisted by the Chief Baron *Smythe* and Mr. Justice *Aston*.

The rules laid down in the judgments there pronounced I take to be these; for, although they are stated only in the judgment of Mr. Justice *Aston*, the Lord Chancellor and the Chief Baron concur in that judgment:—

1. That where there is no internal evidence furnished by the instruments themselves, the general rules of law must be referred to.

2. Where the same specific thing is given twice, it can take place but once.

3. Where the like quantity is given twice, but by different instruments, the legatee is entitled to both.

4. As to a less sum in the later deed—as £100 by the will and £50 by the codicil—the legatee shall take both.

5. As to a larger sum after a less, "the law seems to be, and the authorities only go to prove the legacy not to be double, when it is given for the same cause and in the same act, and *totidem verbis*, or only with a small difference; but when in different writings there is a benefit of equal, greater, or less sums, it is an augmentation."

The decision of Sir *John Leach*, in *Hurst* v. *Beach* (2), is in accordance with the rules I have stated, although expressed with some amplification: "Where a testator leaves two testamentary instruments, and in both has given a legacy *simpliciter* to the same

(1) 1 Bro. C. C. 390, n. (2) 5 Madd. 351, 358.

V.-C. B. 1871 WILSON v. O'LEARY.

person, the Court, considering that he who has twice given must *primâ facie* be intended to mean two gifts, awards to the legatee both legacies; and it is indifferent whether the second legacy is of the same amount, or less, or larger than the first. But if in such two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the Court considers these two coincidences as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift. The Court raises this presumption only where the double coincidence occurs of the same motive, and the same sum in both instruments. It will not raise it if in either instrument there be no motive, or a different motive expressed, although the sums be the same; nor will it raise it if the same motive be expressed in both instruments, and the sums be different."

In *Mackenzie* v. *Mackenzie* (1), which came to be decided several years later by Lord *Eldon*, and where both the cases I have referred to were cited in the argument, I find him saying: "I am not at liberty, according to the rules of this Court, to declare the one legacy to be a substitution for the other." In the later case of *Lee* v. *Pain* (2), Vice-Chancellor Sir *J. Wigram* not only examined and considered with that scrupulous patience and care which characterized his judgments, the several authorities, all of which have been referred to in the argument before me, but went fully and profoundly into the principles on which the rules in *Hooley* v. *Hatton* (3) and in *Hurst* v. *Beach* (4) were established.

The case was one of excessive complication in its details, depending upon the construction of a will dated in 1829, and five codicils made at various subsequent periods down to 1841. The Vice-Chancellor decided each and every of the numerous and various points arising upon each of the legacies, and was enabled to do so with satisfaction to himself, and to the great benefit of the community, by adhering to the rules which previous decisions had established—and to this principle, which his judgment may be said to have established, viz.: that legacies given *simpliciter* to the

(1) 2 Russ. 262.
(2) 4 Hare, 201.
(3) 1 Bro. C. C. 390, n.
(4) 5 Madd. 351, 358.

same legatees by different instruments are cumulative, unless the plain effect of the separate gifts is overruled or impaired by the true construction of the instruments or presumption of law.

Upon the authority of these cases, the several counsel who appear for the legatees have insisted that the legacies given by each of the codicils are cumulative, and that the codicils having been established in the Probate Court, the legal right of the several legatees is established; that there being no ground for raising any presumption against the legal effect of the words in which the testator's intentions are expressed, and no word to be found in the several instruments expressing or indicating an intention of revocation, the will and codicils must be construed literally and exactly as the testator has left them.

On the part of the residuary legatees it was argued at considerable length, and with great ability, that the legacies given by the second codicil were (with the exception of that given to Captain *Eastwick*) in substitution for those which had been given by the will and the first codicil, and great reliance was placed upon Lord *Hardwicke's* decision in *Duke of St. Albans* v. *Beauclerk* (1), which, if it stood alone and unquestioned, would afford strong support to the contention of the legatees. For there, by the codicil, the testatrix gave smaller legacies to the same persons to whom she had given sums of a larger amount by her will, and the decision proceeded not only upon an examination of the then existing authorities, but upon a clear construction of the terms of the will and codicil, which led that great Judge to the conclusion that it was the expressed intention to be collected from the terms of the two instruments, that the legatees were entitled only to the legacies given by the codicil. It must, however, be observed, that high as is the authority of Lord *Hardwicke*, this judgment has not escaped criticism. In *Hooley* v. *Hatton* (2) the Judges declined to follow it. In *Lee* v. *Pain* (3) Sir *J. Wigram* was of opinion that it stood alone, and that it might be difficult to reconcile some of the observations contained in it with more modern decisions; and it is obvious that it was arrived at solely by treating the codicil (which was made seven years after the will) as one and the same instrument with the will—thereby reducing the case to one of the construction of

(1) 2 Atk. 636. (2) 1 Bro. C. C. 390, n. (3) 4 Hare, 201.

V.-C. B. 1871 WILSON v. O LEARY.

an entire instrument. Many other authorities were referred to upon the same side, which I have looked into, but all of them are governed by the well-established rules applicable to cases of construction, where the terms of the instruments furnished the Court with the means and materials for deciding what must be taken to be the expressed intention of the testator. Such a case was *Guy* v. *Sharpe* (1), where, as was said by Sir *E. Sugden, arguendo* (2): "The Court, in forming its judgment, is bound to look at all the facts, and to consider the whole contents and context of the instrument;" and upon this principle the Court proceeded in giving judgment. And the several cases, *Kidd* v. *North* (3), *Russell* v. *Dickson* (4), *Martin* v. *Drinkwater* (5), *Campbell* v. *Lord Radnor* (6), *Coote* v. *Boyd* (7), and *Moggridge* v. *Thackwell* (8), with several others, were all cases in which the Court was satisfied that, upon the construction of the instruments, the latter gift was substitutionary. An affidavit by Mr. *Stephens*, the solicitor of the testator, was offered in evidence on the part of the residuary legatees, and its reception was opposed. I could not reject it until I had heard what it contained. So far as it went to prove the position of the testator at the time when he made the codicil, and thereby to enable the Court to place itself in the situation of the testator at that time, I thought it was admissible; but if it had been for the purpose of shewing either his motives or intention, I should have disregarded and rejected it after having heard it read. It appeared to me, however, to be quite within the rule, for it states merely that after the testator had made his will and the first codicil, and had left them in the care of his solicitor, he sent to him for copies of those instruments, and that the solicitor sent him a copy of the will and the original of the first codicil, with a recommendation to him to recopy the codicil, because his signature to it had been written in an inconvenient place. If the affidavit proves anything to the purpose, as I am of opinion it does not, it proves that when the testator made the second codicil he had the will and the first codicil in his possession, and that having been recommended to recopy his first

(1) 1 My. & K. 589.
(2) Ibid. 597.
(3) 14 Sim. 463
(4) 4 H. L. C. 293.
(5) 2 Beav. 215.
(6) 1 Bro. C. C. 271.
(7) 2 Ibid. 521.
(8) 1 Ves. 464.

codicil, he did not think fit to adopt that suggestion, and both the codicils have been admitted.

It was further suggested, on the part of the residuary legatees, that it ought not to be imputed to the testator as his intention to give two legacies of the same amount to his servant *Samuel Smart*, or a year's wages twice over to every one of his servants. I know of no principle of construction which would justify me in so dealing with the plain words in which the testator has expressed his meaning. I have no right to omit any of those words, or to add to them; and, without omission or addition, the words as they stand appear to present no equivocal or doubtful signification. In June, 1867, he leaves £1500 "to my excellent servant and friend *Samuel Smart*, and an additional £500 if he should be with me at my death;" and at a different time (in January, 1868), by a different instrument, he bequeathed "£1500 to my excellent head-servant *Samuel Smart*, and £500 extra if he shall be with me at my death;" so to "every one of his servants" he gives by the first codicil a year's wages; and by the second codicil he says: "I bequeath a year's wages, liberally interpreted, to all my servants;" and these last legacies to *Smart* and the other servants are, as the former legacies were not, free of legacy duty. It is, perhaps, not the most satisfactory part of Lord *Hardwicke's* decision in the *Duke of St. Albans* v. *Beauclerk* (1), that his Lordship thought it could not be the testator's intention to give two years' wages to his servants. In *Suisse* v. *Lord Lowther* (2), the Court had no difficulty in construing the codicils to Lord *Hertford's* will, by the first of which he divided his servants into two classes—to one he gave one year's wages, and to the other three years' wages; and by another codicil he gave to all his servants who had lived with him three years, three years' wages; and to others one year's wages. It was there not only held that the legacies in the several codicils to *Suisse* were cumulative, but that he was also entitled to share, as a servant, in the gift of wages to that class, as in this case I am of opinion *Samuel Smart* is in like manner entitled. Such being the case, and such being the rules by which the judgment of the Court is guided, and its discretion limited and controlled, I can come to no other conclusion than that the will and

(1) 2 Atk. 636. (2) 2 Hare, 424.

V.-C. B. 1871 WILSON v. O'LEARY.

intention of the testator are expressed in the words he has employed. I find no hesitation, or uncertainty, or ambiguity in those words. I am not at liberty, to use the words of Lord *Eldon*, according to the rules of this Court, to declare that the legacies given by the second codicil are in substitution of those given by the testamentary documents which preceded them in date; but, on the other hand, I am bound to hold that the later gifts are cumulative, and to declare that the legatees are respectively entitled to receive payment of each of those legacies, which, in plain and express words, the testator has given them.

Solicitors: Messrs. *Stephens & Langdale;* Messrs. *Nicholl, Burnett, & Newman;* Messrs. *Williams & James.*

In re CHARITY SCHOOLS OF ST. DUNSTAN-IN-THE-WEST.

V.-C. W.
1871
May 26.

Statutory Jurisdiction—Costs not specified—Settled Rule of the Court.

In proceedings under statutes it is the settled rule of the Court that no costs can be awarded, except such as are authorized by the particular Act.

A proceeding under a statute is not a proceeding in equity.

In re Spitalfields' School (1) not followed.

14 Eq. 229.
19 Eq. 458
17 Ch.D. 380

ON the 5th of November, 1841, the Commissioners of Woods and Forests agreed with the trustees of the charity schools of *St. Martin-in-the-Fields, St. Clement Danes,* and *St. Dunstan-in-the-West,* for the purchase of certain buildings in *Belton Street, London,* for the sum of £3225. The property had been purchased in 1728 by the then trustees of the three parishes, out of funds derived under the will of one *Martha Strode,* dated the 15th of April, 1720. The property was purchased by the Commissioners under the provisions of 3 & 4 Vict. c. 87, being included in the schedule to that Act, and the purchase-money, under the 44th section of that Act, was paid into Court and invested. The powers of that Act were subsequently extended by the 9 & 10 Vict. c. 34.

The trustees of the charity schools for the parish of *St. Dunstan-in-the West* now presented this Petition, praying that the sum of £1162 3*s.* 3*d.* Three per Cent. Consols, being one-third of the invested fund, might be paid to the official trustees of charitable lands; and, secondly, that the costs, charges, and expenses of and incident to this application might be paid by Her Majesty's Commissioners of Woods and Forests out of the fund specified for that purpose by the said Act.

The 49th section of the Act provided that where, by reason of disability, the purchase-money was ordered to be paid into Court, and to be applied in the purchase of other lands to be settled to the like uses in pursuance of the Act, it should be lawful for the Court to order the expenses of all purchases to be made in pur-

(1) Law Rep. 10 Eq. 671.

V.-C. W. 1871 *In re* CHARITY SCHOOLS OF ST. DUNSTAN-IN-THE-WEST.

suance of the Act to be paid by the Commissioners, "who shall from time to time pay such sum or sums of money out of the moneys applicable to the purposes of the Act as the said Court shall direct."

Mr. *Kenyon Parker*, for the Petitioners:—

The question is really *res adjudicata*, and was expressly decided by Vice-Chancellor *Stuart* in *In re Spitalfields' School* (1), on the construction of the same Act. The same principle was acted on by Vice-Chancellor *Parker* in 1852, and subsequently by Vice-Chancellor *Kindersley* in *Ex parte Vicar of St. Sepulchre's* (2), which he decided after the decision of Lord *Westbury* in *In re Cherry's Settled Estates* (3).

Mr. *Chitty*, for the trustees of the parish of *St. Clement Danes*, also contended that the Petitioners were entitled to their costs as prayed.

Mr. *W. W. Karslake*, for the Commissioners:—

The decision in *In re Spitalfields' School* is inconsistent with a long line of authorities, and particularly with the decisions of Lord *Westbury* in *In re Cherry's Settled Estates* and *Ex parte Vicar of St. Sepulchre's* (4).

It is quite clear that, apart from the *Lands Clauses Consolidation Act*, the Court has no power to order payment of these costs; and it is equally clear, from Lord *Westbury's* decision in *In re Cherry's Settled Estates*, that that Act (*Lands Clauses Consolidation Act*), which was passed between the dates of the 3 & 4 Vict. c. 87 and the 9 & 10 Vict. c. 34, was excluded by 9 & 10 Vict. c. 34 from being applied to 3 & 4 Vict. c. 87.

The ground on which *In re Spitalfields' School* was decided was exclusive of the Acts, and was inconsistent with a long line of authorities: *In re Strachan's Estate* (5); *In re Land's Trust* (6).

The VICE-CHANCELLOR:—Mr. *Parker*, Vice-Chancellor *Stuart*

(1) Law Rep. 10 Eq. 671.
(2) 32 L. J. (Ch.) 463.
(3) 31 Ibid. 351.
(4) 33 L. J. (Ch.) 372.
(5) 9 Hare, 185.
(6) 4 K. & J. 81.

proceeded on a very clear and intelligible principle, but you must shew me that I am not bound by *In re Cherry's Settled Estates* (1).

Mr. *Kenyon Parker*, in reply :—

The Vice-Chancellor *Stuart* decided that there was nothing in the Act which deprived the Court of the power to give costs in proceedings in equity.

The VICE-CHANCELLOR :—A proceeding under a statute is not in general a proceeding in equity; but I should be glad to adhere to the decision of Vice-Chancellor *Stuart* if you satisfy me I am not bound by the decision in *In re Cherry's Settled Estates.*

Mr. *Kenyon Parker* :—Lord *Westbury* did not himself adhere to his decision in *In re Cherry's Settled Estates.* In his subsequent decision in *Ex parte Vicar of St. Sepulchre's* (2) he admitted the principle of incorporation, and gave such costs as would have been payable under the *Lands Clauses Act.* If that principle is admitted, there is nothing to prevent the Court giving proper costs, though they might not be mentioned under the particular Act.

SIR JOHN WICKENS, V.C. :—

If the matter were *res integra*, it might well be held that, when the Court is directed to deal with a particular matter, it is implied, unless distinctly negatived, that the Court has jurisdiction over the costs incident to such proceedings. On principle, therefore, I should be disposed to follow the decision of Vice-Chancellor *Stuart.* But such a view would, I think, be in conflict not only with the decision of the Lord Chancellor in *In re Cherry's Settled Estates*, but with a long line of other cases.

I am bound by the decision in *In re Cherry's Settled Estates;* and the only order I can make is, that the Petitioners' costs be paid out of their one-third of the fund, and that the balance be paid to the trustees.

Solicitor for the Petitioners: Mr. *John Mortimer.*

Solicitor for the Respondents: *The Solicitor for the Board of Works.*

(1) 31 L. J. (Ch.) 351. (2) 33 L. J. (Ch.) 372.

V.-C. W.

1871

June 28;
July 1.

DE ROCHEFORT *v.* DAWES.

Mortgages—Primary and Secondary Securities—Fluctuating Debt.

A testator having devised estates *A.* and *B.*, deposited the title-deeds of *A.* with his bankers to secure any balance that might be due from him, and being largely indebted and unable to satisfy the debt, and requiring further small advances, deposited with the bank the title-deeds of *B.* The debt remaining due at his death :—

Held, that the amount due up to the time of the second deposit was payable out of *A.*; and the amount accrued subsequently, out of *A.* and *B.* rateably; the value of *A.* to be computed after payment of the previous mortgage.

7 Ch D. 655
10 Ch D 460, 463, 16 Ch D 217, 225

WILLIAM HENRY DAWES, by his will, dated the 20th of October, 1862, gave to his widow for life an estate called the *Niton* estate. He also gave to his nephew, the Count *de Chabannes*, the *Wydcombe Manor* estate, but he was not to be permitted to sell such estate, or any portion thereof, until twenty years after the testator's death. In the event of his dying without issue before that time, he directed the revenue to be divided among his three nieces for their separate use, and at the end of twenty years to be sold or disposed of for their own benefit and use absolutely. Should the *Niton* estate not be sold previous to his death, he directed it to be sold with all its rights, royalties, and privileges, and also his estate called *Sibbecks*, if not sold previously, and the proceeds to be invested; and after having invested enough to provide £200 per annum for his widow, to be divided into three portions for his three nieces absolutely, as well as the invested fund on the extinction of the said annuity.

The testator banked with the *London and County Bank*, and had entered into an arrangement with the bank that he should have an advance of £8000 on giving them an equitable mortgage by deposit on certain real estates. Accordingly his solicitors, by his direction, on the 24th of October, 1862, deposited with the bank the title-deeds to the *Niton* estate; and on the 24th of October the testator signed a memorandum by which he agreed that these deeds (set out in a schedule) should be held by the bank as a security for all moneys of every description which should

at any time or from time to time be due from him to the bank on the general balance of his account, such balance to include all interest, commission, and other expenses which the bank might charge in respect of any discount, or in obtaining payment of such balance, or in realising such securities. The testator further undertook, on being required by letter to do so, to execute a legal mortgage of the securities comprised in the schedule, and further declared that the security intended to be created by the instrument on any mortgage or mortgages as aforesaid should not be considered as wholly or partially satisfied by payment or liquidation of money due on the general balance, but should extend to cover, and be a continuing security for, all money of every description which should at any time, or from time to time, become due on such balance, notwithstanding such payment.

In pursuance of the arrangement, the bank, on the 24th of October, 1862, advanced to the testator £8267. Contemporaneously with the transaction, the testator was negotiating for a mortgage on the *Niton* estate of £18,000, but it never was completed. On the 4th of May, 1863, the balance against him at the bank being very heavy, the testator on that day addressed to the manager of the *Newport* branch the following memorandum:—

"*Wydcombe Manor House*, May 4th.

"Dear Sir,—As there has been so much greater delay in my paying in the £18,000 to the *London and County Bank* than I anticipated, and as I cannot name the time for a certainty, although I know it will be in a few weeks, I have thought it best to instruct my solicitor, Mr. *Binstead*, to deposit with you the title-deeds of one of my other estates, as I shall be chequeing for a few more small sums, which otherwise I should not like to do.

"*W. H. Dawes.*"

After the receipt of such memorandum the bank did make further advances, and on the 15th of May, 1863, the title-deeds of the *Wydcombe* and *Sibbecks* estates were deposited with the bank; but there were no further sums paid in by the testator.

The testator died on the 21st of November, 1863, and at his death there was due to the bank from his estate the sum of £18,951 8*s.* 11*d.*

V.-C. W. 1871 DE ROCHEFORT v. DAWES.

The bank subsequently filed a bill against the representatives of the testator to realise their securities, and a bill was also filed by the parties interested under the testator's will to administer his estate.

It appeared from the Chief Clerk's certificate that the amount due from the testator to the bank at the date of the second deposit, viz., the 4th of May, 1863, was £17,450 10*s.* 5*d.*, and that £1436 0*s.* 8*d.* became due between that date and his death.

In the suit by the bank, the *Niton* estate was sold for £25,584 8*s.* 11*d.*, out of which, under an order dated the 12th of January, 1870, £25,311 8*s.* 10*d.* was paid to the bank in satisfaction of their claims.

The cause now came on on the Petition of the devisees of the *Niton* estate, and also on further consideration, in order to obtain the direction of the Court as to the proportions in which the *Niton* and the *Wydcombe* and *Sibbecks* estates should contribute to the satisfaction of the amounts paid to the bank.

Mr. *Grenside*, for the devisees of the *Niton* estate, contended that both estates, including the *Sibbecks* estate, ought to contribute rateably towards the satisfaction of the mortgage debt. The whole question turned on the intention of the testator; and from the fact that both estates were devised, it was clear that he intended to benefit both parties.

The authorities on marshalling were clearly in favour of this view: *Tombs* v. *Roch* (1); *Aldrich* v. *Cooper* (2); *Gwynne* v. *Edwards* (3); *Barnes* v. *Racster* (4); and this, in principle, was a case of marshalling.

The only case in conflict with this view was a recent decision of Vice-Chancellor *Malins*: *Lipscomb* v. *Lipscomb* (5); but that was a very peculiar case, as the judgment proceeded on a circumstance that did not occur here.

Mr. *C. Hall*, for Mrs. *Dawes*:—

Lipscomb v. *Lipscomb* hardly applies to this case at all, because

(1) 2 Coll. 490.
(2) 8 Ves. 382.
(3) 2 Russ. 289, n.
(4) 1 Y. & C. Ch. 401.
(5) Law Rep. 7 Eq. 501.

in that case the first mortgage was for a specific sum, whereas here it was for a floating and probably a fluctuating balance. There was, in fact, here no new loan; and to test it you must ascertain whether the mortgagor intended one security to be primary and the other collateral, according to the rule laid down by Lord *Eldon* in *Marquis of Bute* v. *Cunynghame* (1).

Mr. *Morgan*, Q.C., and Mr. *Fischer*, for the Marquis *de Chabannes*:—

The question turns entirely on the intention to be collected from the written documents. The fair construction of the documents is, that the first estate was pledged to secure the debt, and that the second deposit was made only to meet the event of the first security being insufficient.

[They cited *Stringer* v. *Harper* (2).]

Mr. *Ward* appeared for the trustee.

Mr. *Grenside*, in reply, pointed out that *Lipscomb* v. *Lipscomb* (3) was a case of intestacy.

SIR JOHN WICKENS, V.C.:—

Lipscomb v. *Lipscomb* was, in my opinion, well decided, and must govern this case. Two distinctions have been taken between that case and this. First, it is said that here the estates were devised, but that in *Lipscomb* v. *Lipscomb* there was an intestacy. I think there is nothing in that distinction. Secondly, it is said that the debt was in *Lipscomb* v. *Lipscomb* a specific sum, and that here the mortgage was a running security. There is more weight in this argument than in the other, but the fact seems to be that the testator did not know in the first instance what amount he might require, and when he found that he had increased the debt beyond the value of the property pledged, gave further security, which he might well do, without intending to relieve the first estate from the debt already charged on it. The effect of his act was to secure the further debt on both estates.

(1) 2 Russ. 275. (2) 26 Beav. 33. (3) Law Rep. 7 Eq. 501.

V.-C. W. 1871 DE ROCHEFORT v. DAWES.

I read the first memorandum as meaning this: "I want money on *A.* estate;" and the second as saying, "I want more money on the security of *A.* and *B.*" The result is, that the *Niton* estate was charged exclusively with the debt due up to the date of the second memorandum, and that both estates are charged proportionably with the debt incurred subsequently.

[On the authority of *Barnewell* v. *Iremonger* (1) it was admitted that, in estimating the value of the *Niton* estate for the purpose of determining the rate of contribution towards satisfaction of the second mortgage, the amount of the prior mortgage must be deducted.]

Solicitor for the Plaintiff: Mr. *Leach.*

Solicitors for the Marquis *de Chabannes*: Messrs. *Farrer, Ouvry, & Co.*

Solicitors for Mrs. *Dawes*: Messrs. *Fortune & Co.*

V.-C. W. 1871 *July* 5.

PRATT *v.* HARVEY.

Mortmain—Contingent Gift—Rule of Construction.

Bequest of £1000 to be applied towards building a church at *Newark*, near *Northgate*, in connection with the Established Church; but if it should not be commenced during testator's lifetime, or before two years after his death, or if not erected at *Northgate*, then the legacy not to be payable. Notice of the conditions to be given to the legatees:—

Held, void.

To be valid, a charitable gift for building must refer to an existing site, or expressly exclude the application of the money in the purchase of land.

14 Eq. 99
7 Eq. 2067
11 W.R. 952.

J. T. FISHER, by his will, dated the 3rd of December, 1868, after giving numerous legacies, made the following disposition:—

"I give and bequeath £1000 to the committee formed for erecting or building the church now already commenced at *Marsden*, in connection with the Established Church, such sum to be applied towards the erection and completion of the said church, and to

(1) 9 W. R. 88.

be accepted as the performance of a promise made to such committee of a donation towards the said church. I give and bequeath to the vicar and churchwardens for the time being of *Newark-upon-Trent* aforesaid the sum of £1000, to be applied towards the expenses of building another church in *Newark-upon-Trent* aforesaid, near *Northgate* there, in connection with the Established Church; but if the building of such new church in *Newark* shall not be commenced during my lifetime, or before the expiration of two years next after my decease, or if it shall not be erected within half a mile of *Northgate*, then such legacy shall not be payable, but shall form part of my personal estate; and I direct that a written notice of the above-named conditional legacy of £1000 shall be given to the vicar and churchwardens aforesaid, or to some of them, and to the bishop of the diocese, by one or more of my executors, within two calendar months next after my decease."

The testator died on the 16th of May, 1869. A bill was subsequently filed to administer his estate. No land had, in fact, been acquired for the site of a church at *Newark*.

Mr. *Freeman*, for the infant Plaintiffs, said the only question in the cause was the validity of the gift to the church at *Newark*. There was no desire on the part of the executors to defeat the gift; but the Plaintiffs were infants.

Mr. *Charles Hall*, for the Vicar and Churchwardens of *Newark-on-Trent*, contended that the gift was contingent, and subject to a condition precedent, viz., that the church should be commenced in the lifetime of the testator, or within two years after his decease. The testator also directed that a notice of the condition should be given to the parties interested. The gift, therefore, was not an absolute gift, but was on a condition that something should be first done that would remove every objection. If that were not done—viz., the church commenced, and the land necessarily acquired—it would fail from the terms of the gift; but there was nothing inherent in the gift to vitiate it: *Cresswell* v. *Cresswell* (1); *Philpott* v. *President of St. George's Hospital* (2). In order to

(1) Law Rep 6 Eq. 69–75. (2) 6 H. L. C. 338.

4 Jun 1871

V.-C. W. 1871

PRATT v. HARVEY.

invalidate a gift for a charitable purpose, it was not enough to shew that it had a tendency to lead to the prohibited act.

Mr. *Freeman*, for the Plaintiffs, contended that the gift was void, as being an inducement to bring land into mortmain. The case of *In re Whatmough's Trusts* (1) was not distinguishable from this case, and must govern it. He also cited *Hawkins* v. *Allen* (2).

Mr. *Charles Hall*, in reply.

SIR JOHN WICKENS, V.C.:—

If the sentence had stopped at the conclusion of the words of gift, and before the clause containing conditions, no question could arise but that the gift was invalid. The question is, whether the conditions make it good.

The rule of the Court is now well settled, that in order to validate a gift of this kind, you must find in the will a reference to an existing site, on which the building contemplated shall be erected, or you must find words expressly excluding the application of the money given in the acquisition of land.

There is here no site referred to, nor is the language of the gift sufficient to exclude the purchase of land. Suppose the trustees of this church had £2000 subscribed, and that the whole cost of the church and site was estimated at £3000, would or could they not purchase the land, and make arrangements for the erection of the church in dependence upon this legacy, as part of the general funds? Supposing the cost of the church and site to be £3000, and three testators to give £1000 each on the same conditions as this legacy, would all the gifts be good? It seems impossible to hold so. There must, therefore, be a declaration that the gift is void, except to the extent of £500—to which extent the statute 43 Geo. 3, c. 108, protects it.

Solicitors: Messrs. *Petgrave & Hodgkinson*; Messrs. *Swann & Co.*

(1) Law Rep. 8 Eq. 272. (2) Law Rep. 10 Eq. 246.

POINTON *v.* POINTON.

V.-C. W.
1871
June 11.

Executor and Trustee—Surviving Partner and Purchaser—Bill for Administration of Testator's Estate and of Partnership Affairs—Misjoinder of Subjects — Parties — Multifariousness — 15 & 16 Vict. c. 86, s. 42, rule 9— Demurrer.

Three out of four of testator's children, residuary legatees (the fourth being out of the jurisdiction), filed a bill against their mother, the tenant for life, and their uncle (who had carried on business in partnership with their father), and who were executrix and executor and trustees of the will, alleging that the uncle had possessed himself of and employed the estate of the testator, and had occasioned great loss to it; that he had mismanaged the partnership business; that he intended to get in and to apply the outstanding debts to his own use, and that he had bought at a valuation a portion of the estate, but had not paid the purchase-money; and praying for accounts of the estate of the testator, and of what the uncle had, or but for his wilful default and neglect might have received; and that he might be charged with what was now due from him in all respects, and with all losses occasioned by his mismanagement; and for a receiver and for an injunction. A demurrer by the uncle for multifariousness and for want of parties was overruled.

DEMURRER for multifariousness and for want of parties.

George Pointon, who died on the 6th of January, 1863, leaving a widow, the Defendant *Eliza Pointon*, and four children, three of whom were Plaintiffs, the fourth being out of the jurisdiction, and not a party to the suit, him surviving, and who at the time of his decease was carrying on, in partnership with his brother, the Defendant *William Pointon*, the businesses of lime burner and corn merchant and miller, by will, dated the 2nd of January, 1863, after bequeathing all his furniture to his wife, subject to the payment of certain debts, gave, devised, and bequeathed all his property, real and personal, unto his wife and to his brother *William Pointon*, whom he appointed executors, upon trust to convert into money by sale, or by *William Pointon* taking all or any part thereof by valuation, which he thereby empowered him to do, and to invest (as in the will mentioned) for the benefit of his wife for life, and after her decease or second marriage to divide the same equally amongst all his children. The bill, filed on the 16th of

V.-C. W. 1871 POINTON v. POINTON.

May, 1871, against *William Pointon* and the testator's widow, alleged that the testator's estate included his share and interest in the assets of the partnership; that the affairs of the partnership had not been wound up; that *William Pointon*, on the death of the testator, possessed himself of such assets; that he had carried and was carrying on the businesses under the old style; that it was expedient that the testator's estate should be administered by the Court; also that the accounts of the partnership should be taken; that this could not be conveniently done, except in this suit or in one similarly constituted, *William Pointon* being both executor and surviving partner; that *William Pointon* ought to account for what he had received, and for what, but for his wilful default and neglect, he might have received on account of the testator's estate; that he had employed the testator's estate in the businesses, and had thereby occasioned great loss to it; that he had mismanaged and neglected the businesses, and that thereby large sums had been lost to the testator's estate. There were also allegations that he was getting in the outstanding partnership debts, and that he intended to apply them to his own use; that he had agreed to purchase *Forge Mill* and the stock-in-trade, part of the partnership assets, at a valuation, and had obtained a conveyance of the mill, but had not paid the purchase-money either in respect of the mill or in respect of the stock-in-trade, and that he had advertised the mill for sale by auction.

The Plaintiffs, three children of the testator, prayed that his estate might be administered; for accounts of what *William Pointon* had received, or, but for his wilful default and neglect, might have received; and that he might be charged with what was due from him in respect of the partnership, both before and since the death of the testator, and with all losses occasioned by his mismanagement and neglect in reference to the businesses; for a receiver of the testator's estate and of the assets of the partnership and of the businesses carried on by *William Pointon* since the death of the testator; and for injunctions to restrain *William Pointon* from interfering with the testator's estate and the assets of the partnership before and since his death, and from selling the mill; and for the appointment of new trustees; and for all proper accounts.

Mr. *Greene*, Q.C., and Mr. *F. H. Colt*, for the demurrer, on behalf of *William Pointon*:—

The Plaintiffs are endeavouring to mix up together three different causes of suit all inconsistent with each other, viz., the administration of the testator's estate, the administration of the partnership affairs, and the question whether *William Pointon* ought to be restrained by an injunction from dealing with the property which he has purchased, and one moiety of which is his own. Clearly these are matters of relief which ought to be the subjects of separate suits. The Plaintiffs ought not to mix up the individual rights of *William Pointon* with his fiduciary position. *Ward* v. *Duke of Northumberland* (1) supports the proposition that one person filling different capacities cannot be mixed up in all matters of complaint against him and another, and that was followed, on appeal, in *Salvidge* v. *Hyde* (2), and in *Pearse* v. *Hewitt* (3).

If the purchase-money referred to has not been paid, it ought to be the subject of a distinct suit. There is no allegation of collusion. If an executor has assets of a testator in his hands he becomes a debtor, and is accountable to the estate; but here there is a power in *William Pointon* to effect a sale of the assets at a valuation to himself; that has been done, and the sale to him has converted the property into a debt as between himself and his co-executrix. He is at law the absolute owner of the property without any trust fastened upon it. Being purchaser, the Plaintiffs must proceed against him by virtue of the contract. They cannot proceed against him in his fiduciary character. In respect of any vendor's lien, the claim ought to be the subject of another suit: *Campbell* v. *Mackay* (4).

There is a clear and obvious distinction between Mr. *Pointon's* positions as purchaser and as trustee under the will. Clearly the suit is objectionable for multifariousness. Further, *George Pointon*, the fourth child, said to be out of the jurisdiction, ought to be a party to the suit, for there can be no conclusive decree until all the affairs in which he is interested are wound up: *Payne* v. *Parker* (5). This case is very different from one for administration, where, after

(1) 2 Anstr. 469.
(2) 5 Madd. 138; Jac. 151.
(3) 7 Sim. 471.
(4) 1 My. & Cr. 603, 618.
(5) Law Rep. 1 Ch. 327.

V.-C. W. 1871 POINTON v. POINTON.

serving *cestuis que trust* with notice of the decree, they are, under the statute 15 & 16 Vict. c. 86, s. 42, bound; but the clauses of that section do not apply to any suit framed as this is. This is a case of alleged wilful default against a trustee, and he has a right to say, if the Court deals with it at all, it shall be done effectually at once.

In *Daniell's* Chancery Practice (1) it is stated "that persons having co-existent rights with the Plaintiff to sue the Defendant must be brought before the Court in all cases where the subject-matter of the right is to be litigated in equity."

The case of *Jesse* v. *Bennett* (2) is distinguishable from this, as is the case of *Devaynes* v. *Robinson* (3); but *Payne* v. *Parker* (4) is precisely in point when the facts there stated are looked at, and the Defendant relies upon that case in support of his demurrer. The Plaintiffs seek to stop *William Pointon* from dealing with his own property—for as to one moiety it is his own, and as to the other moiety there is no lien—and that of itself is sufficient to justify the Court in allowing this demurrer.

Mr. *Dickinson*, Q.C., and Mr. *Marten*, for the Plaintiffs, were not called upon.

SIR JOHN WICKENS, V.C.:—

I think that the demurrer to this bill is not well founded. It is a demurrer for want of parties, and for what is called multifariousness, but which is really misjoinder of subjects in a suit. As to the objection for want of parties, the case appears to me to be clearly within the 9th rule of s. 42 of the 15 & 16 Vict. c. 86, and I think it is impossible to hold that three out of four *cestuis que trust*—residuary legatees—cannot sue an executor, because the fourth has not been brought before the Court, without doing away with the operation of this clause of the section. The only authority which has been relied upon on this point is the case of *Payne* v. *Parker*. That is a case of this sort: A trustee under a settlement was brought before the Court to represent the interests of the *cestuis que trust*, and the Plaintiff, having elected to have those

(1) Vol. i. p. 202. 5th 189
(2) 6 D. M. & G. 609. 2 Jur. N.S. 1125.
(3) 24 Beav. 86. 3 Jur. N.S. 7
(4) Law Rep. 1 Ch. 327. 12 Jur.

interests represented, was bound to have them represented by proper persons. The only question was, whether he had done so; and the Court decided that the trustee, Mr. *Heningham*, did not sufficiently represent the interests of the *cestuis que trust*, and required that they should be made parties; and I think that the Court could not have decided otherwise. But that case, when attentively looked at, has, in my opinion, no application to the present.

Next, as to the question of multifariousness: I think that there is no more in the objection on that ground than there is in that for want of parties. There are three analogous vices to which bills in equity are subject—misjoinder of Plaintiffs, misjoinder of Defendants, and multifariousness or misjoinder of subjects of suit. It is the last which is imputed to this bill. Multifariousness, properly so called, exists when one of the Defendants is not interested in the whole of the relief sought, as the old form of the demurrer for multifariousness shews. Misjoinder of subjects of suit is where two subjects distinct in their nature are united in one bill, and for convenience' sake the Court requires them to be put in two separate records. The case of *Salvidge* v. *Hyde* (1), in which the bill was for the administration of a testator's estate, and to set aside a sale made of part of it by the executor, was an instance of this. There the Court refused to allow the two subjects to be united, although the Plaintiff was interested in each, and the Defendants were liable in respect of each. In the present case the misjoinder is of this nature: the suit is first an ordinary suit against the devisees in trust and executors for the administration of the real and personal estates of the testator; and, secondly, the Plaintiffs claim to have the partnership accounts taken as between the testator's estate and the Defendant *William Pointon*, the testator's partner and one of the executors and trustees; and then the suit is further complicated in this way: it is alleged that *William Pointon* has sold to himself or taken possession of the partnership assets at a valuation under a power in the will, and that he has not paid for them. It is suggested that not only is the price of such assets in his hands, but that he having sold to himself without payment, what was purported to be sold remains assets of the

(1) 5 Madd. 138; Jac. 151.

V.-C. W. 1871 POINTON v. POINTON.

testator till the price is paid. If a trustee who is entitled to take property at a valuation has a valuation made, but does not pay the money, nothing passes; until the money has been paid he has no interest in the property.

It is not necessary to consider whether the Plaintiffs are or are not entitled to all the relief which they ask; but the question is, whether the various subjects as to which relief is sought are such as if fit for discussion can be properly dealt with in one suit. This is, of course, a matter of discretion. The Court will not allow distinct subjects to be mixed up in one suit when it would be inconvenient to the Court, or unfair to some one or more of the parties to it; but not one of these considerations, or of those mentioned in the case of *Campbell* v. *Mackay* (1), applies to the present case. The estate of the testator cannot be wound up until the partnership accounts have been taken, nor until it has been ascertained whether *William Pointon* will pay the purchase-money or not. It is quite clear that, if there are to be separate suits, they must be closely intermixed, and the winding-up of the principal suit must await that of the other or others, and before it can be found out what the estate of the testator consists of, or what *William Pointon* owes to it, the partnership accounts must be taken. I am wholly unable to discover why they should not be taken in this suit. If it would result in inconvenience or unfairness, it would be another matter; but it appears to me to be impossible to say that any inconvenience can be apprehended, or that any injustice will be done. My opinion being that the objection as to misjoinder of subjects has failed as completely as that as to misjoinder of parties, the demurrer must be overruled.

Solicitors: Mr. *John Burton*, agent for Mr. *F. Salt, Tunstall;* Messrs. *Bell, Brodrick, & Gray*, agents for Mr. *Alexander Day, Runcorn, Cheshire.*

(1) 1 My. & Cr. 603.

In re BETTON'S TRUST ESTATES.

V.-C. W.
1871
July 13.

Wife's Rent-charge—Mortgage—Reconveyance to Husband—Wife's Equity of Redemption—Title—Parol Evidence of Intention.

A married woman was entitled for life, in the event of surviving her husband, to a rent-charge. She joined him in executing a mortgage of the estates upon which it was charged, and by the mortgage deed absolutely released and extinguished her rent-charge. A portion of the estates was reconveyed by the mortgagees to the husband released from the mortgage, and he afterwards remortgaged the same to other mortgagees, who under a power entered into a contract for sale. The title being objected to, on the ground that the rent-charge was still subsisting, the vendors produced parol evidence that the former mortgagees had stipulated with the solicitor of the mortgagor and his wife for the absolute release of the rent-charge:—

Held, that where a wife joins in a mortgage deed, her equity of redemption is not released if there be no express contract on her part to do so, and that at any rate the title was too doubtful to be forced upon the purchasers.

ADJOURNED SUMMONS.

By an indenture dated the 29th of August, 1832, Mr. *St. Quintin* charged certain parts of his estates in the counties of *Cambridge* and *Buckingham* with a jointure rent-charge of £200 in favour of *Louisa St. Quintin*, his wife, in the event of her surviving him; and by an indenture dated the 20th of February, 1835, the rent-charge was shifted upon certain other parts of the same estates. In 1853, existing mortgages of the estates, charged with the rent-charge, were transferred to certain mortgagees to secure, with a further sum advanced, to Mr. *St. Quintin* the sum of £39,000.

At the same time two other mortgagees advanced, on the security of the same estates, two sums of £5000 and £1000. Mrs. *St. Quintin* was a party to, and executed and acknowledged, the mortgage deed for securing the £39,000; and the deed recited that the mortgagees had agreed to advance the money in consideration of her joining in the deed "in manner hereinafter expressed and for the purpose hereinafter appearing." By the operative part she conveyed the estates "for the purpose of absolutely releasing and for ever extinguishing" the rent-charge; and by the proviso for redemption, the estates (which were conveyed to the mortgagees subject to certain prior charges) were to be reconveyed to Mr.

V.-C. W. 1871 *In re* Betton's Trust Estates.

St. Quintin, his heirs and assigns, "subject as aforesaid." Mrs. *St. Quintin* was not a party to either of the two subsequent mortgages.

In 1859 parts of the estates were released from the three mortgages and reconveyed by the mortgagees to Mr. *St. Quintin*, who shortly afterwards mortgaged the same to other mortgagees for the sum of £6000, with a power of sale. The *Ironmongers' Company*, being trustees of trust funds which had been paid into Court in this matter under the provisions of the *Lands Clauses Consolidation Act*, 1845, entered into a contract with the mortgagees of 1859 for the purchase of *Field Side Farm*, a part of these remortgaged estates. The purchase was, in January, 1870, approved by the Court, subject to the usual reference as to title. The conveyancing counsel before whom the matter came having objected to the title on the ground that Mrs. *St. Quintin's* release of her rent-charge by the mortgage deed of 1853 was only for the purpose of giving priority to the mortgage, and did not affect the equity of redemption, the vendors produced the following evidence as to the transaction in 1853: The three mortgages were parts of the same transaction for raising the aggregate sum of £45,000, and the same solicitor acted for the three sets of mortgagees, and was himself one of the second mortgagees. The draft of the mortgage for £39,000 was originally prepared by Mr. *Davidson*, the conveyancer, in the form in which the deed was afterwards executed, except that the words "for ever" in the clause of the operative part above set out were not inserted. In the margin of the draft, opposite to the words relating to the release of the rent-charge, Mr. *A. B.* wrote "*quære*, postponing only." The draft having been sent to the solicitor of Mr. and Mrs. *St. Quintin* for his perusal, he struck out the words "absolutely releasing and extinguishing," and substituted for them the words "postponing to the charge hereby created;" and he added to the proviso for redemption words expressly providing that the estate should be reconveyed subject to the rent-charge. The mortgagees' solicitor objected to the proposed alterations, on the ground that unless the rent-charge was absolutely released, it would be necessary to make Mrs. *St. Quintin* a party to the two subsequent mortgages. After some discussion, it was ultimately agreed that the words "absolutely releasing and

extinguishing" should be restored, and the words "for ever" inserted before the word "extinguishing." The addition to the proviso for redemption was also expunged, so that it remained a proviso for reconveyance "subject as aforesaid." When the draft was finally settled, the mortgagees' solicitor wrote to the mortgagor's solicitor thus:—"I have settled the draft as originally drawn by Mr. *Davidson*, that is to say, making Mrs. *St. Quintin* absolutely release her annuity, by which means she is not a necessary party to any of the subsequent mortgage deeds." Notwithstanding this evidence, the conveyancing counsel was of opinion that the rent-charge was not effectually released, and that the title was consequently defective; and the Chief Clerk accordingly certified that a good title could not be made. The vendors then took out this summons to vary the Chief Clerk's certificate.

Mr. *Joshua Williams*, Q.C., and Mr. *Dalton*, for the vendors:—

It was intended that this rent-charge should be absolutely released, and the language used in the deed of 1853 was sufficient for the purpose. There may be in some cases a resulting trust, though the release of the deed be absolute; but here there is clear parol evidence of the intention of the wife to do more than release for the purpose of the mortgage. Parol evidence of the intention of the parties may be admitted in support of a title. The cases of *Lord Braybroke* v. *Inskip* (1), *Smith* v. *Death* (2), *Fillingham* v. *Bromley* (3), *Spencer* v. *Topham* (4), *Clinton* v. *Hooper* (5), and *Earl of Kinnoul* v. *Money* (6), also *Tudor's* Leading Cases (7), bear upon the subject; and looking at the deed it will be seen that the intention is sufficiently expressed. The cases in which the wife has been held entitled to the equity of redemption, some of which have gone a great length upon this point, shew that it is merely a presumption of equity arising from the circumstances of the parties, which may be rebutted by evidence of a contrary intention. Here there is such evidence, both in the deed itself and in what passed during the transaction. No doubt the purchasers will rely upon

(1) 8 Ves. 417.
(2) 5 Madd. 371.
(3) T. & R. 530.
(4) 22 Beav. 573.
(5) 1 Ves. 173.
(6) 3 Sw. 202.
(7) 3rd Ed. vol. ii. p. 922.

V.-C. W. 1871

In re Betton's Trust Estates.

the cases of *Wood* v. *Wood* (1), *Eddleston* v. *Collins* (2), *Whitbread* v. *Smith* (3), and *Heather* v. *O'Neill* (4), but they are all founded upon mistake. In this case, however, there has been no mistake and no fraud, and there is no ground for supposing that there was any; and, upon the whole, it is submitted that it must be held that Mrs. *St. Quintin* absolutely released and extinguished her rent-charge, and that the certificate ought to be varied by stating that the title is a good one.

Mr. *Dickinson*, Q.C., and Mr. *Wingfield*, for the purchasers:—

No doubt there was, for the purpose of these particular mortgages, considerable discussion as to whether Mrs. *St. Quintin* should absolutely release her annuity. Suppose the £39,000 had been repaid, would not Mrs. *St. Quintin* have been able to say that the object for which she joined had been answered—that the particular purpose was at an end, and that the estates reverted to their former position?

The case of *Eddleston* v. *Collins* (5) confirms the general rule, that the purpose being answered, the original position will be restored.

The case shews nothing more than a conveyance by a wife to secure her husband's debt. Putting out of sight the negotiations in this case, if this had been, not a wife's rent-charge, but her estate, it would have been a conveyance subject to redemption, and in such a case a reconveyance to the husband would not have altered the title existing before the mortgage. In the proviso for redemption, the words "subject as aforesaid" may extend to include this rent-charge; but even if those words had been omitted, the cases shew that the terms in which the equity of redemption is reserved in such a case do not take away the wife's right, unless the intention to do so is clearly expressed; consequently, in this case, the wife's title has revived by this reconveyance. It is contended on the other side that parol evidence will be received to prove the intention, but in the cases cited isolated facts only were proved. However, if all the evidence produced be admitted,

(1) 7 Beav. 183.
(2) 3 D. M. & G. 1. 17 Jur. 331
(3) 3 D. M. & G. 727. 17 Jur. 725
(4) 2 De G. & J. 399. 4 Jur. N. S. 957
(5) 3 D. M. & G. 1-15. 17 Jur. 331.

it only proves that the mortgagees required the rent-charge to be released for the purpose of the mortgages, which have now been paid off, and not that the husband was to have the equity of redemption discharged from his wife's rent-charge. The Court will not force upon a purchaser a title depending on parol evidence in the absence of the party against whose right the evidence is adduced. The summons, therefore, ought to be dismissed.

Mr. *Joshua Williams*, in reply:—

This is not a case of construction. The words of the deed admit of no doubt whatsoever. At law the annuity is gone for ever, the wife having conveyed, released, and extinguished it in such a manner that it could not revive again. Her title in equity rests solely on an equitable presumption. The cases shew that parol evidence is admissible to rebut any such presumption; and here the parol evidence conclusively rebuts it.

SIR JOHN WICKENS, V.C.:—

I think that this title is too doubtful to be forced upon a purchaser. In my opinion, the decision in *Wood* v. *Wood* (1) lays down the rule of the Court in such a case. The case of *Eddleston* v. *Collins* (2) seems to me to have been inaccurately summarised—indeed materially misstated in the marginal note. But even if it had been correctly stated, the case, as it stands, does not support the vendors' contention, nor, in fact, do any of the other cases which have been cited on his behalf. Of course, where, as in some of them, the equity of redemption is reserved as to part of the estate in one way, and as to another part of the estate in another way, the argument is very strong indeed in favour of these different limitations having been intended to mean different things, and even of both having been intended to mean exactly what they imported. It may be shewn on the face of a mortgage deed that there is an intention to resettle the equity of redemption, but it must be shewn by something which bears expressly on that identical point. I do not say that it must be stated in terms that there is an intention to resettle, but it must be shewn unequivocally that there is the intention. There are three parts of this deed which are

(1) 7 Beav. 183. (2) 3 D. M. & G. 1. 17 Jur. 331

V.-C. W. 1871 *In re* Betton's Trust Estates.

alleged to bear upon the point: the recital, which merely leads up to the operative part; the operative part itself; and the proviso for redemption. The proviso is ambiguous, much more ambiguous than the one in the case of *Wood* v. *Wood* (1); in fact, the only part of the deed which assists the vendors' contention is the operative part, and that is insufficient for their purpose. It is a release of the rent-charge to the mortgagees, their heirs and assigns, to whom at the same time the estates were absolutely conveyed. It is no unreasonable view that the absolute release of the rent-charge was to be, as the absolute conveyance of the estate was to be, subject to the equity of redemption. Therefore, on the deed standing alone, I think that Mrs. *St. Quintin's* concurrence is necessary to free the title from all doubt.

It is said, however, that there is parol evidence to rebut the *primâ facie* construction of the deed and the conclusion of equity. Now, I by no means hold that a title depending on parol evidence is always a bad one; but it is to be observed that what ought to be shewn in this case is a particular contract between the husband and the wife, and all that has been shewn is a particular contract between the mortgagees and the husband; which the wife accepted and made binding on herself by acknowledging the deed, so far as the deed contained it, but not further. If the deed contained no such contract, the wife did not come under it by acknowledgment, though the husband's deed was deliberately framed with the intention of making her do so. I hold that the deed does not import an express contract by the wife to release her equity of redemption, and, if so, there is nothing which binds her to perfect this title; and therefore the summons must be dismissed with costs.

Solicitors: Mr. *A. Warner*; Mr. *S. Adams Beck*.

(1) 7 Beav. 183.

HARBIN *v.* MASTERMAN.

V.-C. W.
1871
July 12, 14.

Will—Annuities—Bequest to Charities—Direction to accumulate Surplus—Thellusson Act.

Testator bequeathed annuities, and directed his trustees, in case the annual income of the trust moneys should not be sufficient for them, to apportion the deficiency rateably; and that in case of there being any surplus income they should invest it every year, and after the decease of the surviving annuitant should convert the trust property and stand possessed of the moneys and the accumulations in trust to pay and divide the same into the several public charities named (five in number), according to the amounts (£100 in each case) set after their names. The testator had no next of kin. After completely providing for the annuities there was a large surplus, consisting of pure and impure personalty:—

Held, that the five charities were entitled equally to the whole of the residuary pure personalty, and the accumulations during the period of twenty-one years from the death of the testator; and that the Crown was entitled to the impure personalty:

Held also, that the charities were not entitled to have the accumulations stopped, and to be paid at once, but that the accumulations must go on till further order.

20 L.J. 258, 260. 3 Ch.D. 282

FURTHER CONSIDERATION.

J. F. Duncan, who died on the 1st of January, 1865, by will, on the 15th of February, 1860, after appointing two executors; directing all his debts to be paid; and making a specific bequest to his wife (who predeceased him), gave all the residue of his personal estate unto the executors, upon trust out of the annual income to pay a legacy and certain annuities to the persons named. But in case the annual income of the trust moneys should not be sufficient for the payment of the whole amount of the annuities, he directed his trustees to apportion the deficiency between the annuitants according to the amount of their annuities, and so that the same should rateably abate; and upon further trust, that the trustees should in every year after his decease invest the surplus income, if any, of the trust moneys, whether such surplus should arise from the determination of any annuity or otherwise, in the securities mentioned, "and from and after the decease of the survivor of the said annuitants, do and shall sell, dispose of, and convert into money all such part of the said

V.-C. W. 1871 HARBIN v. MASTERMAN.

trust moneys, stocks, funds, and securities, and the accumulations thereof respectively, as shall not actually consist of cash, and stand possessed of the money to arise from such sale, disposition, and conversion, and also of such part of the said trust moneys, stocks, funds, and securities, and the accumulations thereof respectively, as shall consist of actual cash, in trust to pay and divide the same into the several public charities hereinafter named, according to the amounts set after their respective names (that is to say): to the treasurer for the time being of an institution known by the name of the *London Orphan Asylum*, for the reception and education of destitute orphans, established in *London*, £100; to the public dispensary, *Carey Street*, near *Lincoln's Inn*, £100; to the *Royal Free Hospital, Gray's Inn Road*, £100; to the *King's College Hospital*, in *Carey Street, Lincoln's Inn*, £100; and to an institution called the [here there was a blank line], under the patronage of the late Lord Mayor of *London*, Alderman *Wire*, the sum of £100, for the benefit of persons afflicted with paralysis."

The suit was instituted in April, 1865, for the administration of the real and personal estate of the testator.

The Chief Clerk's certificate shewed that the testator had not at the time of his death any next of kin. It also shewed that the fifth charity intended to be benefited was the *National Hospital for the Relief and Cure of the Paralysed and Epileptic*.

The pure personalty amounted to the sum of £25,838 2*s.* 3*d.*, and the impure personalty to the sum of £3063 14*s.*

Complete provision had been made by various orders in the cause for the payment of the annuities.

Mr. *Greene*, Q.C., and Mr. *Jackson*, for the treasurer of the *London Orphan Asylum* (who had the carriage of the decree):—

The question is as to the construction of the residuary gift in this will. What is meant by the words "in trust to pay and divide the same (trust moneys) into the several public charities hereinafter named, according to the amounts set after their respective names?" Clearly the only possible construction of them is that the residue is to be divided amongst these charities equally in proportion to the sums mentioned, and therefore the *London Orphan Asylum* claims to be entitled to one-fifth of the pure per-

sonalty. As to the accumulations, though there may possibly be an interval between the twenty-one years from the death of the testator and the death of the surviving annuitant, yet the Court, the annuities being provided for, has power to stop the accumulations, and to order payment to the charities notwithstanding the *Thellusson Act* (39 & 40 Geo. 3, c. 98); and it is submitted that that power ought to be exercised on behalf of the charities.

Mr. *Dickinson*, Q.C., and Mr. *Hallett*, for the treasurer of the *Royal Free Hospital*:—

There can be no doubt that the testator's intention was to give all his residue for the benefit of these charities, for there is no gift whatever after that to the charities except the trust "to pay and divide" amongst them; and in all such cases the Court will so construe the gift as to prevent an intestacy: *Robinson* v. *Hicks* (1); *Jesson* v. *Wright* (2); *Morrall* v. *Sutton* (3). The testator had no family and no next of kin, and if the charities are not entitled the Crown will be. There is every presumption in favour of the view that the testator did not intend to die intestate: *Philipps* v. *Chamberlaine* (4); *Ford* v. *Ford* (5). *Roper* on Legacies (6) contains some general rules which may be useful to refer to in such a case as this. Looking at all the facts and circumstances, it is submitted that these charities are entitled to ask not only for the residue but for the accumulations, and that gives them a right to ask that the funds shall be paid to them at once. Notwithstanding the case of *Mathews* v. *Keble* (7), the charities will be entitled to the accumulations.

[They also cited *O'Neill* v. *Lucas* (8) and *Griffiths* v. *Vere* (9).]

[Mr. *Hemming*, for the *Attorney-General*, referred to *Nettleton* v. *Stephenson* (10).]

The decision there does not govern the point. It was probably contemplated by this testator that the income would not be more than sufficient to pay the annuities. In consequence, however, of

(1) 3 Bro. P. C. 180.
(2) 2 Bli. 1–56.
(3) 1 Ph. 533.
(4) 4 Ves. 50.
(5) 6 Hare, 486–492.
(6) Vol. ii. 1460–1.
(7) Law Rep. 4 Eq. 467; 3 Ch. 691
(8) 2 Keen, 313.
(9) 9 Ves. 127.
(10) 3 De G. & Sm. 366.

V.-C. W. 1871 HARBIN v. MASTERMAN.

the deaths of some of the annuitants, there is now a larger fund than necessary to provide for the annuities. The proposition is not whether the *Thellusson Act* accelerated the right to receive the legacies, but the question is, whether but for that Act there would be any objection to the direction to accumulate? This direction, however, simply applies to the surplus fund. The object for which that direction was given is at an end, and but for the Act there can be no doubt the charities would be entitled to ask to be paid at once. *Ellis* v. *Maxwell* (1) has some bearing on the point, but the difficulty which arose in that case does not occur here.

Though there be a direction to accumulate, yet if in fact the particular object no longer exists, the fund may be let loose, and be given to the persons who have a vested interest in it. These charities have a vested interest. The accumulations were directed for their benefit, but they do not want any to be made; they desire to have the fund. The cases of *Bryan* v. *Collins* (2), *Drewett* v. *Pollard* (3), *O'Neill* v. *Lucas* (4), and *McDonald* v. *Bryce* (5), conflict with the decision in *Ellis* v. *Maxwell*, which governs this case. The charities are entitled to immediate payment, upon the ground that the direction to make the accumulations beyond twenty-one years is void within the *Thellusson Act*. They are clearly entitled to the income during the twenty-one years, and they have a right to say that there shall be no accumulations during or after that period.

[They also cited *Wilson* v. *Wilson* (6).]

Mr. *Cracknall*, for the treasurer of the *Carey Street Dispensary*:—

The testator intended, after providing for the annuities, to throw his property into one mass, and to have it converted into money, and then his trustees were "to pay and divide" the corpus and accumulations "into the several public charities" named "according to the amounts set after their names;" and the only question is, whether the time has come when that payment and division can take place; and it is submitted that it has. As to the

(1) 3 Beav. 587; 12 Beav. 104.
(2) 16 Ibid. 14.
(3) 27 Ibid. 190.
(4) 2 Keen, 313.
(5) Ibid. 276.
(6) 1 Sim. (N.S.) 288.

accumulations, I contend that, having regard to the whole scope of the will, the state in which the testator died (there being no next of kin), and the assets, what was in the testator's mind was this—a desire to protect the annuities; and that as that result, in consequence of deaths, has been arrived at, the charities are entitled to be paid now.

[He referred to *Lomax* v. *Holmeden* (1)].

Mr. *Graham Hastings*, for the treasurer of *King's College Hospital*, and Mr. *Higgins*, for the treasurer of the *National Hospital for the Relief and Cure of the Paralysed and Epileptic*, supported the arguments on behalf of the other charities.

Mr. *Hemming*, for the Attorney-General, on behalf of the Crown:—

The arguments on behalf of the charities amount only to this, that the testator intended that the residue should be divided into five equal portions, and be paid to the charities; but the words "pay and divide the same into," do not give the charities the residue, nor do the words "according to" mean "in proportion to" the legacies or "the amounts set after their respective names." It is as extraordinary and as unnatural a sentence as ever escaped from a testator. What may be inferred from it is that he contemplated disposing of the whole of his property amongst various charities—not merely the five named; that he filled up the list as to some of them, and that he failed to name others which he intended to put in the list; but in fact he certainly has not given more than £100 to each of these charities.

[The VICE-CHANCELLOR:—Assuming that I am against your view on this point, have I any power, and if so, am I not bound, looking at the authorities, to stop the accumulations and give the charities the fund at once, seeing that they may eventually be entitled to the accumulations? The direction to accumulate is expressly limited to the lives of the annuitants. Will the Crown be entitled to the accumulations?]

This is not an ordinary residuary gift which will carry the accumulations; they are not carried over to the residuary gift, and

(1) 3 P. Wms. 176.

V.-C. W. 1871 HARBIN v. MASTERMAN.

therefore they would go, if there were any, to the next of kin; but there being no next of kin, they will go to the Crown. The right to ask that accumulations may be stopped depends on the assumption that ultimately the legatee must be, in any case, the only person benefited: that is not so since the *Thellusson Act*.

Mr. *Langworthy*, for the trustees and the Plaintiffs in the cause.

Mr. *Greene*, in reply:—

The object and purpose of the testator were simply to provide for the annuities. He thought that possibly the fund would not be sufficient, but he did not direct that the accumulations should be for any fixed period, or during the life of any annuitant.

[The VICE-CHANCELLOR:—The distinction is, that the accumulations were to go on till the death of the surviving annuitant.]

No; I submit not. When the purpose for which they were directed has ceased, the funds vest in the charities. There is nothing in the *Thellusson Act* to interfere with their right to ask the Court to stop the accumulations, the annuities having been secured. The Act does not compel the trustees to accumulate. The cases referred to do not interfere with what, I submit, was the design of the testator, the language of whose will is unmistakeably clear; and the charities are, therefore, entitled to immediate payment.

SIR JOHN WICKENS, V.C.:—

3 Ch. D. 282

I have no doubt at all that the testator has given his residuary estate to these five charities equally. It is true that he has used a most awkward periphrasis for the purpose of conveying a very simple idea. But the language admits of no other construction than that contended for on behalf of the five charities, namely, that he intended to give them the residue equally. Therefore, as regards the pure personalty and the accumulations, I hold that they were well given to the five charities equally. But, having regard to the frame of the will, though the annuities are amply secured, I do not think that I can order a division of the fund at present. If the residuary legatees were five individuals, I should probably do so, there being nothing in the *Thellusson Act* to prevent

it. But the legatees being charities, am I entitled to stop the accumulations? If a sum of money be given to be accumulated, say for ten years, and then to a charity, is the charity, whether incorporate or unincorporate, entitled to claim the money at once? There may be sound reasons for deferring the enjoyment. A testator may think that the charity has a certain provision during the present generation of subscribers, and that it will not want any additional provision. And it is obvious that though the charity remains the same, yet, if the gift is to take effect ten years hence, a different class of persons will be benefited. It does not appear that all these charities have perpetual existence; but the distinction between an incorporated and unincorporated charity is, I think, too refined to be relied upon. The safe and proper course with respect to all these charities is, I think, to direct that the accumulations should go on until further order. If all the annuitants should die within twenty-one years, there will be no difficulty, but if the accumulations should go on beyond twenty-one years, the Crown may possibly claim them. Whether such a claim, if made, would be valid or not, I give no opinion. As regards the pure personalty, I hold that the residue and the accumulations were well given to the five charities in equal shares, but there will be no order directing payment at present to the charities. As regards the impure personalty, as I cannot, for any useful purpose, retain the money in Court, I shall direct it to be paid to the Crown at once.

Solicitors: Messrs. *Winter, Williams, & Co.;* Messrs. *Hyde & Tandy;* Mr. *Edward Jennings;* Messrs. *Gadsden & Treherne;* Messrs. *Parker, Lee, & Haddock;* Messrs. *Harbin & Smith;* Messrs. *Raven & Bradley.*

V.-C. W.
1871
July 25.

In re COTTRELL'S ESTATE.
JOYCE *v.* COTTRELL.

Administration—Intestacy—Claim by a Mother for Maintenance out of Son's Estate.

Where a mother made advances to a son during his minority, and not with the intention of afterwards claiming as a creditor against his estate:—

Held, that there was no debt due to her for maintenance during such minority:

Held, also, that to support a claim by a mother for maintenance during a period after the son attained majority, there must have been a contract; and as none had been shewn, the claim was disallowed.

THE suit of *Joyce* v. *Cottrell* was instituted by a sister of *Joseph Cottrell* and her husband against her brother *William Cottrell*, for the administration of *Joseph Cottrell's* personal estate. *Joseph Cottrell* died intestate on the 18th of September, 1861, and his brother *William* was appointed administrator.

Samuel Cottrell, the father of *Joseph*, died in 1849. By his will he gave £100 to each of his children, and £1000 more to his son *Joseph*, and directed that the legacies to *Joseph* should not be paid to him until he attained the age of twenty-eight years, unless his guardians—his mother, *Mary Ann Cottrell*, and the executors—should think proper. In the meantime the interest was to be applied for his maintenance and education.

Joseph Cottrell was, when his father died, fifteen years of age, and he attained twenty-one in 1855. He always resided with his mother. A suit of *Cottrell* v. *Cottrell* (*William Cottrell* being Plaintiff and *Mary Ann Cottrell* Defendant) was instituted for the purpose of having the trusts of *Samuel Cottrell's* will executed. In that suit the Chief Clerk, in pursuance of an inquiry as to who maintained *Joseph Cottrell* after the death of his father, and what would be proper to be allowed for his maintenance from such death and down to what day, on the 24th of April, 1865, certified that from such death down to the death of *Joseph* in September, 1861, he was maintained by his mother, and that the sum of £920 was proper to be allowed in respect thereof. The next of kin of *Joseph* were his mother, *Mary Ann Cottrell*, Mrs. *Joyce*, *William Cottrell*,

and two other sisters; and all attended the proceedings in the suit of *Cottrell* v. *Cottrell*.

By the order upon further consideration in *Cottrell* v. *Cottrell*, dated the 20th of November, 1869, no direction was given as to the £920, but the order was expressed to be made without prejudice to any question as to the right of the mother in respect of the claim for the maintenance of *Joseph*.

The mother now, in the suit of *Joyce* v. *Cottrell*, claimed to be paid the sum of £920 as a debt against *Joseph's* estate.

It appeared that the income arising from the £1100 was, during the minority of *Joseph*, received by his mother; that on the 7th of September, 1855, he was paid by the executors the principal sums; and that he, on the 20th of September, 1865, lent the whole (less £50 paid for duty) to his mother on the mortgage of an estate. The cause now came on upon further consideration, and there was also an adjourned summons.

Mr. *E. Russell Roberts*, for the Plaintiffs, stated the facts of the case, and said that they wished the money to be paid to the mother.

Mr. *Dickinson*, Q.C., and Mr. *Lake*, for the mother:—

A claim for the maintenance of *Joseph* was carried in in *Cottrell* v. *Cottrell*, but it could not be entertained in that suit. But, at the instance of *William*, the inquiry (mentioned above) was directed, and he did not object to the claim as being an improper one, but to the amount. The certificate of the Chief Clerk is, however, conclusive as to the allowance and the amount.

The case of *Bruin* v. *Knott* (1) is a distinct authority for allowing past maintenance. The mother ought to be reimbursed the amount which she has expended. The same principle applies here as in cases of lunacy. It is a question of indemnity, and the mother ought to be paid this sum out of *Joseph's* estate.

Mr. *C. Chapman Barber*, and Mr. *Bedwell*, for *William Cottrell*:—

The mother never made this claim during the lifetime of *Joseph*, and there is now no pretence whatever for making such a claim

(1) 1 Ph. 572.

V.-C. W. 1871 *In re* Cottrell's Estate. Joyce *v.* Cottrell.

for maintenance either during the minority of *Joseph* or after he attained his majority, and to his death. The utmost that could be claimed would be in respect of sums expended between the death of the father and the date of *Joseph's* majority, but for his maintenance during that period the mother has been paid. The mother has not shewn that *Joseph* made any contract with her after he attained twenty-one. After the death of any person, those who come forward with claims against his estate must produce evidence in support of them; their own affidavits are not sufficient. The mere circumstance that the mother did in fact maintain *Joseph* is not sufficient to justify the Court in awarding her this or any other sum.

Mr. *Langley*, for a sister of *Joseph*:—

The certificate made in the other suit is not binding in this one. The issues in the two suits are different, for *Joseph* was not a party to that of *Cottrell* v. *Cottrell*. If there were other creditors of *Joseph Cottrell*, they would not be barred by anything done in that suit, they not being represented. Here the parties are co-Defendants, and there can be no issue between them. The question in the former suit, whether the trusts of *Samuel's* will as to maintenance had been performed, cannot be raised here.

[He cited *Worthington* v. *M'Craer* (1) and *Grove* v. *Price* (2).]

Mr. *Dickinson*, in reply:—

The cases just cited do not apply. There is really nothing to distinguish this case from that of *Bruin* v. *Knott* (3). It was necessary to make the claim in this suit, because there was a possibility of other creditors' claims; but there are none, and as between the parties before the Court the claim is *res judicata*.

Sir John Wickens, V.C.:—

The only question is, whether this claim is or is not a debt against the estate of *Joseph Cottrell* in respect of the sums expended for his maintenance by his mother; and that question resolves itself into two parts—first, as to the sums expended during

(1) 23 Beav. 81. (2) 26 Beav. 103-105.
(3) 1 Ph. 572.

the minority of *Joseph;* and, secondly, as to those expended after he attained majority. When a mother maintains an infant child, although not under any legal liability to do so, she may be considered to do it under one of three views: first, with the intention of afterwards claiming the amount as a debt due to her; secondly, as an act of maternal duty, or of kindness, or as bounty, that is as a gift; or thirdly, she may do it on an intermediate footing, that is to say, in the expectation or the hope of being recouped by means of an order for maintenance, out of some fund under the jurisdiction of the Court, and which it would allow to be so applied, although such expenditure had not been previously sanctioned by the Court. But if a mother, or any other person, confers a gift, intending it as a gift at the time, she cannot afterwards, under a changed state of circumstances, assert that it was a loan. In the present case, did the mother make the advances during the minority of *Joseph* with the intention of afterwards claiming as a creditor? I see no reason to believe that she did do so, and therefore I hold that there is no debt for maintenance during such minority. It is probably not necessary to consider whether she made these advances during the minority with the intention of afterwards claiming them out of a fund under the control of the Court. In my opinion it is clear she did not, from what took place after the son came of age; for I cannot conceive stronger evidence of intention not to claim any repayment than is manifested by her handing over the sum of £1050 in the manner in which she did. But in any case the fund I am now dealing with is not under the control of the Court, otherwise than for the purpose of administration of the intestate's estate; and I am now trying the question as against it as a jury would try the question in an action of assumpsit. As to what took place after the majority, the case has even more entirely failed. What the mother has to shew is a contract, and she has shewn none. In fact, it seems clear that she never, during the six years between the majority and the death of *Joseph Cottrell*, had the smallest idea of claiming repayment of anything from him. Probably nothing would have surprised him more than her intimating an intention to do so. He might possibly in that case have said: "If I am to live here at an expense which is to be claimed after-

V.-C. W. 1871 *In re* COTTRELL'S ESTATE. JOYCE *v.* COTTRELL.

wards against me, I will go and live somewhere else." She was bound to intimate such an intention to him if it existed. But she never, as I believe, formed such an intention, and she certainly never intimated it. The precise question before me could not have arisen in the former suit, and I do not think that the certificate in any way binds me to hold that there was a debt. Being convinced that there was none, I must dismiss the summons, and order that the claim be disallowed.

Solicitors: Messrs. *Chester & Urquhart;* Messrs. *Poole & Gamlen;* Mr. *Edward Pope.*

V.-C. W. 1871 *July* 25.

BAIN *v.* SADLER.

Will—Insolvency of Testator—Legal and Equitable Assets—Executor's Right of Retainer—Rateable Distribution.

14 Eq 383, 18 Ch D 185 24 Ch D 657-8

A trustee of an estate devised or conveyed to him for the purpose of paying debts has no right of retainer thereout, whether he is executor or not.

An executor, who was also trustee for sale of an estate for the payment of debts, was a creditor of his testator, who died insolvent, and had received personal estate which he had retained in part satisfaction of his debt. The real estate was sold, a portion before the time when a creditor's suit was instituted, and the remainder under the decree, and the proceeds as to part were in the executor's hands, and the remainder in Court:—

Held, that the other creditors must be paid out of the proceeds of sale up to an equality with the executor, and that there must then be a rateable distribution.

Lovegrove v. *Cooper* (1) and *Hall* v. *Macdonald* (2) observed upon.

HENRY DYKE, by will, in Michaelmas, 1867, and who died shortly afterwards, gave his real and personal estate to *John Sadler* (who alone proved the will) and another, upon trusts, *inter alia*, to sell so much as might be necessary for the payment of debts, funeral and testamentary expenses.

The testator was at the time of his death indebted to the Plaintiff *William Bain* in the sum of £319 17s., and he was also indebted to various other persons on simple contract.

The Defendant *John Sadler* having alleged that the testator's estate was insufficient for the payment of debts, a bill was filed in

(1) 2 Sm. & Giff. 271. (2) 14 Sim. 1.

May, 1868, on behalf of creditors, for the administration of the real and personal estate, and on the 17th of April, 1869, a decree was made for that purpose.

On the 4th of July, 1871, the Chief Clerk certified that the simple contract debts of the testator amounted, with interest and certain costs, to £3745 15*s.* 4*s.*; that the Defendant *Sadler* had received personal estate to the amount of £487 1*s.* 3*d.*; that he had paid, or was entitled to be allowed on account thereof, £287 6*s.* 5*d.*, leaving a balance due from him of £199 14*s.*, which he claimed to retain in part satisfaction of a debt due to him of £909 9*s.* 5*d.*

It became necessary to sell the testator's real estate, and a portion was sold before the institution of the suit, and the remainder was sold under the decree. The Defendant *Sadler* had received proceeds of sale amounting to £930, out of which he had paid £538 8*s.* 10*d.*, leaving in his hands £391 11*s.* 2*d.* He had also received rents to the amount of £10 8*s.* 7*d.*, making together in his hands on real estate account £401 19*s.* 9*d.*

In July, 1869, on a summons asking that *Sadler* might be ordered to pay into Court a sum of £440 (being proceeds of real and personal estate), Vice-Chancellor *Stuart* held that he was entitled to retain it pending questions on the accounts.

The testator's personal estate now consisted of the £199 14*s.* in the Defendant *Sadler's* hands, and £60 17*s.* 9*d.*, proceeds of sale of personalty (paid in pursuance of an order into Court to the credit of the cause). These sums were admitted to be legal assets which the Defendant *Sadler* was entitled to retain in part satisfaction of his debt. The testator's real estate consisted of bank annuities and cash in Court, together over £2300, proceeds of sale of real estate, and the sum of £401 19*s.* 9*d.* in the Defendant *Sadler's* hands. A summons had been taken out asking that this sum might be paid into Court.

The question was, what were the Defendant *Sadler's* rights as executor in respect of his debt, and against what funds?

Mr. *Dickinson*, Q.C., and Mr. *W. C. Harvey*, for the Plaintiff:—

It is admitted that the executor has a right to retain the legal assets, but has he a right to be paid anything out of the equitable

V.-C. W. 1871 BAIN v. SADLER.

assets until the other creditors have been put upon an equality with him? It is submitted he has not. Such a creditor as against other creditors of equal degree has a right even by compulsion to obtain payment, yet he can have only that which he can attach and retain: *Silk* v. *Prime* (1); *Tudor's* Leading Cases in Equity (2), and cases there cited; *Williams* on Executors (3). The debt of the Defendant has been reduced by the legal assets which he has retained; and the equitable assets to be administered in this suit must be applied rateably and equally. In *Lovegrove* v. *Cooper* (4) a different principle was adopted, but it is thought not to be consistent with former cases. The Defendant seeks to retain out of property devised to him in trust for sale and to pay debts a sum in priority; but though executor, he is also a trustee, and being so, his conscience is affected in favour of the other creditors, and he is bound to take care of their interests. It is clear that in this Court all are equal. Equality is equity. Under the will this property formed equitable assets for distribution amongst all the creditors; and that being so, they must be paid *pari passu;* and the Defendant having already been paid a certain sum, he can be paid no more until the other creditors have been made equal with him.

[They also cited *Cook* v. *Gregson* (5).]

Mr. *Karslake*, Q.C., and Mr. *Freeman*, for the Defendant:—

The Court is now asked to do that which has not been done since 1844: *Hall* v. *Macdonald* (6); *Seton* on Decrees (7). The fallacy of the argument is in using the words "equitable assets" in one sense and the "right of retainer" in another. An executor can receive rents and pay himself in full, or he may sell a part of the estate and pay himself in full; and the same law applies as if he had received legal assets. He is not bound to look after the interests of other persons.

Mr. *Dickinson*, in reply:—

There is no case like that of *Hall* v. *Macdonald;* but all that was decided there was the right of retainer. That right is per-

(1) 1 Bro. C. C. 138, n.
(2) 3rd Ed. vol. ii. p. 95–120.
(3) 3rd Ed. vol. ii. p. 1555.
(4) 2 Sm. & Giff. 271.
(5) 3 Drew. 547.
(6) 14 Sim. 1.
(7) 3rd Ed. vol. ii. p. 742.

fectly clear as regards legal assets. The executor has a preference as to legal assets; but in equity there must be equality, and no preference.

SIR JOHN WICKENS, V.C.:—

The difficulty in this case is created by the decision in *Hall* v. *Macdonald*, or rather by a passage occurring in the report of that case. I do not doubt that Vice-Chancellor *Shadwell's* decision was right, but I cannot help thinking that Mr. *Simons* misconceived what he said. The point in question, it will be observed, is not that on which the case is reported, but is mentioned incidentally. In any case, it seems to me that this case is, in fact, settled by a principle so well established that I might venture to act on it, even against so great an authority as that of Vice-Chancellor *Shadwell*. There is no doubt as to the right of retainer on the part of an executor as against legal assets. There is also, I think, such a preponderance of authority in favour of holding that assets like these are equitable, that, notwithstanding the decision in *Lovegrove* v. *Cooper*, I may so hold. The rule laid down by the statute, 3 & 4 Will. 4, c. 104, is anomalous. I believe that it cannot be reconciled with the principles of equity, but that it must be rested entirely upon decisions, and upon the words of the statute. The trustee of an estate devised for sale, and who is not an executor, has no right whatever analogous to that of an executor who is a creditor. His rights are like those of a person to whom estates are conveyed in trust for sale for the purpose of paying debts, who has, if a creditor, no right analogous to the right of retainer. That being so, is it possible that the union of the characters of trustee for sale and executor in one and the same person can give to the executor rights over the estate he takes as trustee, which, in his character of trustee, he would not have? It would be difficult so to hold in the case of an executor who was not an original but a derivative trustee; or the case of an executor who was appointed under a power before the sale; or the case of a trustee for sale who became personal representative, not having been so appointed, but by being executor of the original executor. Yet I do not see where you are to stop if you once say that the union of the two distinct characters of executor and trustee in the same person gives to the trustee

V.-C. W. 1871 BAIN v. SADLER.

rights analogous to those he has as executor, but which he would in no way have as being merely a trustee. I think that, as against assets like these, his rights are precisely the same, whether he is executor *plus* trustee or not; and, consequently, that he has no right of retainer. The consequence will be, in accordance with Mr. *Dickinson's* argument, that is to say, the other creditors must be paid out of the equitable assets up to an equality with the executor, and then there must be a rateable distribution.

Solicitors: Mr. *John W. Sykes;* Messrs. *White & Son.*

Cocks v. *Manners* (1871) L. R. 12 Eq. 574 Followed. *In re* COATS' TRUSTS. COATS *v.* GILMOUR [1948] 1 Ch. 1 — *Followed.* *In re* COATS' TRUSTS. [1948] 1 Ch. 340

Approved. GILMOUR *v.* COATS. [1949] 1 All E.R. 848. — *Approved.* GILMOUR *v.* COATS. [1949] A. C. 426

COCKS *v.* MANNERS.

July 24, 25, 26.

Bequests to a Convent and to Sisters of Charity—Voluntary Associations—Charitable Institutions—43 Eliz. c. 4—Religious Services.

Testatrix, a married woman, bequeathed the residue of all her property, consisting of impure and pure personalty belonging to her separate use, to be divided equally between four religious institutions, two of them being the Dominican convent at *C.*, an institution consisting of Roman Catholic females living together by mutual agreement in a state of celibacy, under a common superior, for the purpose of sanctifying their own souls by prayer and pious contemplation, and the Sisters of Charity of *St. Paul* at *S. O.*, an institution composed of Roman Catholic women living together by mutual consent, whose primary object was personal sanctification, and who, as a means thereto, employed themselves in the exercise of works of piety and charity in teaching the poor and nursing the sick; and directed that the payments should be made to the superior for the time being respectively:—

Held, that the community of sisters at *S. O.* was a voluntary association and a charitable institution, and that the bequest to them was good as to the pure personalty:

Held, also, that the bequest to the Dominican convent at *C.* was neither within the letter nor the spirit of 43 Eliz. c. 4; that it was good both as to the pure and impure personalty; and that it was not void on the ground of perpetuity.

Semble, religious purposes are charitable only when religious services tend directly or indirectly towards the instruction or edification of the public.

FRANCES MANNERS, who died on the 19th of February, 1870, the late wife of the Defendant *W. W. Manners*, by will or testamentary appointment, dated the 1st of June, 1867, said: "I do hereby, pursuant to every power me enabling, appoint

and bequeath all my property belonging to my separate use at my death, or over which I have any power of disposition, as follows:—All my jewelry, watches, and ornaments I leave to my executors to divide among my children in any way they think best and most suitable, and the residue of my disposable property I leave equally between the following religious institutions, viz., the *Newport Catholic Chapel*, for the general purposes thereof, and payable to the officiating priest for the time being; the *Brighton Catholic Chapel* in *Upper St. James's Street*, payable for the like purposes to the officiating priest; the Dominican convent at *Carisbrook* (payable to the superior for the time being), and the Sisters of the Charity of *St. Paul* at *Selley Oak*, near *Birmingham* (payable to the superior thereof for the time being); and I declare that the receipts of the officiating priests of the said chapels and the receipts of the superiors of the other two institutions for the time being respectively shall be good discharges to my executors." The testatrix appointed her husband and her brother-in-law, the Plaintiff, to be her executors. At the time of the death of the testatrix there belonged to her for her separate use, or was subject to a power of testamentary appointment or disposition by her, certain pure and impure personal estate; and as *W. W. Manners* insisted that the gift of the residue to the religious institutions was invalid in law, and failed so far as such residue consisted of any interest in land or of the produce of any property which at the time of the death of the testatrix consisted of an interest in land, and that he was entitled for his own use and benefit to all such parts of such residue, this bill was, in July, 1870, filed for the purpose of obtaining a declaration how far the trusts and dispositions of the will were legal and valid, and that the same might be carried into execution, and that the estate subject to the will might be administered by the Court.

On the 5th of November, 1870, a decree was made ordering certain inquiries and accounts, and one inquiry was: What are the institutions referred to in the will as the Dominican convent at *Carisbrook* and the Sisters of Charity of *St. Paul* at *Selley Oak*, and whether they are charitable institutions within the meaning of the *Mortmain Act?* The Chief Clerk, in June, 1871, certified that the institution referred to as the Dominican convent at *Caris-*

V.-C. W. 1871 COCKS v. MANNERS.

brook "is an institution consisting of Roman Catholic females living together by mutual agreement in a state of celibacy, and under a common superior, for the purpose of sanctifying their own souls by prayer and pious contemplation within their institution, and without performing external works or providing for public worship, or engaging in education, or receiving or visiting the sick or poor, or indigent or children, and without relieving the poor except casually and accidentally, and not as one of the objects of the institution, and without engaging in any of the corporeal works of mercy; and it has not been and is not any part of the duties or objects or ordinary functions of the institution to perform works of charity, and that a small portion of the chapel attached to the institution is registered and open to the use of the public." Also that the institution referred to as the Sisters of the Charity of *St. Paul* at *Selley Oak* "is the institution called the congregation of the Sisters of Charity of *St. Paul* at *Selley Oak*, and is an institution which has been established there for several years, is composed of Roman Catholic women living together by mutual consent, partly at *Selley Oak* and partly at various subordinate establishments in other parts of *England*, to which members of the congregation are from time to time sent, they still continuing members of the institution at *Selley Oak*; that the primary object of the congregation is the personal sanctification of the members, who, as a means thereto, employ themselves in the exercise of works of piety and charity, principally in teaching the children of the poor and in nursing the sick; that they are enjoined to employ themselves sedulously to acquire sufficient skill and knowledge to enable them to become teachers in schools and nurses of the sick, and when found to be fully competent they are chiefly employed in those capacities in localities where their services are required, and they receive small stipends for their services from those at whose instance they render them; that in order to procure admission into the congregation a pension is required from each member during the period of her probation and training, and until she is qualified to earn a livelihood by her own exertions; all moneys thus received and also all moneys earned by the members are paid into the common fund of the congregation at *Selley Oak*, and are the property of the

members of the congregation, and are applied for the maintenance and support of such members and otherwise at their discretion, and it is their habit to give to works of religion and piety and in almsgiving at their discretion any surplus thereof beyond what is required for the purposes of the congregation; that the members of the congregation retain their vested rights in any property which may belong to them, but while members of the congregation the receipt and application of its revenues is interdicted to them, and for that reason before their admission they are required to make over to some person or persons of their own selection the administration of all their property, and to direct the application of its revenues according to instructions then given; but such disposal of property is provisional only, and ceases to have any effect in case they leave the congregation, and a power of revocation even while remaining in the congregation may be inserted in the deed if desired; that the same rule applies to any property which may come to the members after their admission by way of inheritance or by bequest; that they may dispose of all property by will or by deed of gift if such disposition is made with the consent of the superior and council of the congregation, and with the like consent they may also execute any legal document and do any other legal act required of them for any of the above-named purposes; and that if the parents or near relatives of any of the members become involved in difficulties so as to be in real want, such members may ask that the whole, or a competent part, of any property which they may have brought into the congregation may be applied to their relief, and the superior and council of the congregation may order accordingly."

The superioress of the Dominican convent at *Carisbrook*, *Agnes Barker*, on cross-examination on her affidavit, stated that the convent was built by Lady *Clare* in December, 1865; that she bought the land and gave it; that the land was vested in the names of several persons in trust for the institution; that the current expenses of the institution were paid from their funds; that the society was previously established at *Hurst Green, Lancashire;* that the convent there was sold, and the produce went into the funds at *Carisbrook;* that she and the sisters would not have the power to sell the building and build if they wished to remove,

V.-C. W. 1871 COCKS v. MANNERS.

as they could not do that without the consent of the whole community, and she believed the Pope must give his consent to such a thing as that, and the [Roman Catholic] bishop of the diocese also; that the purchase-money would go into the common fund of the community; that by their religious obligations of poverty they could not without consent divert it to any other purpose than that of the community; that none of the members visited the sick, nor did anything outside the convent, and she did not think that the income of their common fund was more than sufficient to maintain the community.

And *Genevieve Dupuis*, the superioress of the congregation at *Selley Oak*, on her cross-examination on her affidavit, stated that the sisters had been established at *Selley Oak* since 1864, but that the institution previously existed at *Banbury*, and had existed since 1704; that the present buildings were provided by their own earnings, derived chiefly from teaching the poor (not in *England*), which went into a common fund. She and three sisters wholly controlled and managed the affairs and property of the institution, and they had not to consult any one outside it on any question. The revenue of the property of each new member went to the common fund for the support of the members, still she reserved the capital of her property, but required the consent of the superior and council to dispose of it. The property in the building of the institution was vested in four or five members for the purposes of the institution, and it belonged to the community. If they should be dissolved every one would take her share; but so long as they were not dissolved the property would go on for the community. The chapel was their private property just the same as any other part of their property.

The cause came on to be heard upon further consideration, and on summons to vary the certificate by omitting the paragraphs above stated within inverted commas, and by including other evidence produced on the inquiry before the Chief Clerk.

The question was, whether the two institutions, or either, and which of them, were or was charitable.

The total amount of the realty and impure personalty was £26,237 19*s.* 1*d.*, and the total amount of the pure personalty was £405 13*s.* 5*d.*

Mr. *Greene*, Q.C., and Mr. *C. Browne*, for the Plaintiff, one of the trustees, stated the facts, and said it was admitted that the chapels and institutions were entitled to share in the pure personalty, and that the only question for the consideration of the Court was, whether the gift to the two institutions were void either in the whole or as to part, on the ground of their being charitable, or as creating a perpetuity.

Mr. *Dickinson*, Q.C., and Mr. *Dryden*, for the Defendant *W. W. Manners*:—

The gift to the Dominican convent at *Carisbrook* is bad, on the ground of its being a perpetuity, and not charitable. It is a gift to the institution, and not to the nuns individually who were there at the testatrix's death. If it had been a gift to them as individuals, they would be, by the regulations of the institution, trustees of the fund for the benefit of the community, a perpetual institution; for the evidence shews that it has existed for a number of years, and that it is being continually renewed by other members being added to the community. It must be assumed that the testatrix intended that the institution should last for ever: no period is contemplated by its rules for its dissolution. It was an attempt on the part of the testatrix to make a bequest for a perpetual purpose, and, therefore, on this ground, the gift is bad: *Thomson* v. *Shakespear* (1).

If the gift be not void on the ground of its being a perpetuity, it fails, as being charitable, so far as the realty, or that which savours of it, is concerned. It is a charitable institution, because it was founded for the advancement of religion and for the relief of indigent poor. The chapel is open to the public, and the services, including the saying of masses and praying for the dead, are performed by priests, who are paid out of the funds of the institution, and these things are unlawful. If the charitable purpose fails in part, it fails altogether, and the next of kin are entitled: *Morice* v. *Bishop of Durham* (2); *Baker* v. *Sutton* (3). This convent is both a religious and a charitable institution, and is, of course, subject to the rules of law affecting gifts to such institutions. *Townsend* v. *Carus* (4) cannot be dis-

(1) 1 D. F. & J. 399; Joh. 612.
(2) 9 Ves. 399; 10 Ves. 522.
(3) 1 Keen, 224.
(4) 3 Hare, 257.

(1) 1 C 6 Jur. N.S. 110, 251

V.-C. W. 1871 COCKS v. MANNERS.

tinguished from this case, and *Beaumont* v. *Oliveira* (1) also supports this view.

As to the gift to the Sisters of the Charity of *St. Paul* at *Selley Oak*, the evidence clearly shews that the objects of that institution are the teaching of the children of the poor and the nursing of the sick, and these are obviously charitable, and within the meaning of the statute. The gift, if good at all, is only so so far as regards the pure personalty.

[They also cited *Carne* v. *Long* (2).]

Mr. *Karslake*, Q.C., for the Defendant *Dupuis*, the superioress of the Sisters of the Charity of *St. Paul* at *Selley Oak* :—

The objects of the institution are charitable, yet it is not a charitable institution. It is not the case of a bequest made to a school, a hospital, or to a reformatory. The institution is in the position of a club. A number of ladies have agreed to reside together, and to spend a portion of their time in teaching and relieving the poor, and in nursing the sick, as a means of sanctification. The gift is good as a charitable use: *Townsend* v. *Carus* (3); *Baker* v. *Sutton* (4). The community is one united together by mutual consent, and is not incorporated. Having no corporate capacity, the institution can be dissolved at any time, and therefore the decisions in *Thomson* v. *Shakespear* (5), and *Carne* v. *Long*, do not apply. Certainly the gift is not void on the ground of its being a perpetuity. The rule of law against perpetuities has no application to the case, and indeed there is nothing to invalidate the bequest.

Mr. *Morgan*, Q.C. (Mr. *Bagshawe* with him), for the Dominican convent, and Mr. *Karslake*, Q.C., for both institutions :—

The gift to this institution is not void on the ground of its being a perpetuity, for there is nothing to be found in the regulations of it which tends to fetter the alienation of its property. The evidence shews that the whole of the funds may be expended in providing necessaries for the community, and wherein does this differ from a

(1) Law Rep. 4 Ch. 309.
(2) 2 D. F. & J. 75.
(3) 3 Hare, 257.
(4) 1 Keen, 224.
(5) 1 D. F. & J. 399; 3 Joh. 612.

club, or from an association of gentlemen for the promotion of evangelical views? There is nothing to prevent the expenditure of the corpus of the property. In the case of *Thomson* v. *Shakespear* the fund was given for the use of a particular locality, and the trustees could not expend the capital; and in *Carne* v. *Long* the Lord Chancellor said, "it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were;" therefore neither of these cases apply here. To make a gift charitable, a benefit must be intended for the public; a mere charitable tendency is not enough: *Jones* v. *Williams* (1); *Attorney-General* v. *Haberdashers' Company* (2); *Ommanney* v. *Butcher* (3); *Jarman* on Wills (4).

A gift would not be void because it would benefit the poor. The testatrix had the sisters in view, and not the objects to which they devote their lives, and gifts to individuals who fill a religious character are not charitable: *Doe* v. *Copestake* (5); *Doe* v. *Aldridge* (6).

A gift to religious persons, whether by name to an individual or to a body, is not necessarily a gift for a charitable purpose, unless its benefit be extended to the public.

Nothing could be more general or public than the objects in *Townsend* v. *Carus* and in *Carne* v. *Long;* but the objects which these sisters have in view are essentially not public—the institution is not intended for the public in general, but is solely for those ladies who compose it, and who must be regarded as forming a purely voluntary association. These institutions cannot be distinguished from the various clubs which exist (and there is no reason why clubs should not be for religious as well as for political purposes), except in this particular, that there are vows of poverty, chastity, and obedience taken; but there is nothing in the evidence which completely raises any question of vows, and the onus is on the other side to shew that these institutions are incapable of taking a charitable gift, such as the Attorney-General can enforce. The law does not say that vows are unlawful, but that they have no binding force or effect. The vow of poverty means that these

(1) Amb. 651.
(2) 1 My. & K. 420.
(3) T. & R. 260.
(4) 3rd Ed. vol. i. p. 194.
(5) 6 East, 328.
(6) 4 T. R. 264.

V.-C. W. 1871 COCKS v. MANNERS.

ladies bind themselves to eschew superfluities, but there exists no tribunal which can enforce anything of the sort. The obligations *inter se* have nothing to do with the case. This is a gift of property to be brought into the common fund—in the same mode as if a legacy were left to the *Athenæum Club*. The vow of chastity the law disregards. If one of these ladies married, she would not be allowed to remain a member of the institution. As to the vow of obedience, that is only a matter *inter se;* it has no effect on the rights of the ladies in reference to the common fund. There is in these vows nothing which deprives or fetters these ladies in the mode of enjoying their property. The Court disregards any external law as affecting the right to take and enjoy property: *Wallgrave* v. *Tebbs* (1).

There is here no obligation of trust or contract, and the ladies who form the community are competent to vary or abrogate the rules of it at pleasure. It is immaterial whether the testatrix knew what the rules were. If there had been any communication between the parties as to her intentions, it might give a right to a trust; but there is, in fact, no trust expressed or implied. All that is known is, that the testatrix called them religious institutions, and that she left them this property for their general purposes, without imposing any obligation whatever. A club can divide its property at pleasure, and there is no perpetuity: *Hopkinson* v. *Marquis of Exeter* (2); and these institutions, being in the position of a club, can do the same thing, and there are no *cestuis que trust* to say it shall not be done. Neither the Charity Commissioners, nor the Attorney-General, nor the representative of any deceased member, have or has any right to inquire into these institutions. There is no duty or obligation to accumulate funds. The law against perpetuities having no application, are these institutions to be regarded as charitable? The gifts are very vague and indefinite, and in any case of an abuse of them, how could the Court interfere with them? These institutions are, in fact, like the *Mendicity* and other societies in the metropolis—mere conduit-pipes to convey voluntary contributions: *Nightingale* v. *Goulbourn* (3).

(1) 2 K. & J. 313. (2) Law Rep. 5 Eq. 63.
(3) 5 Hare, 484; 2 Ph. 594.

There is no power in the Court to intervene and to make a bequest of this sort a charitable gift. As to the Dominican convent, how, if this money be paid to it, can the Attorney-General determine the mode in which it shall be spent, whether in prayer or for corporeal necessities, and how much for each? As to the sisters at *Selley Oak*, no doubt the objects of that institution are distinctly charitable, but there is no obligation upon them to spend this property in charity; and there is not sufficient evidence to make it clear to the Court that the testatrix intended that it should go in charity and not to the sisters individually; therefore the gifts ought to be upheld.

[He also cited *Whicker* v. *Hume* (1), *Mitford* v. *Reynolds* (2), and *Attorney-General* v. *Whorwood* (3).]

Mr. *Dickinson*, in reply:—

This is a gift to religious institutions, and not to institutions like clubs. It does not appear that the testatrix knew any one or more of these ladies, but did she not expect that schools would be benefited by her gift? Canon law, of course, this Court will not take notice of; and though it will not compel the vows taken by these ladies to be observed, yet it will observe that these vows are distinct and clear evidence of what are the objects of the institutions, and of the rules by which they are governed, and that they point to perpetuity. The common fund was not contributed by these ladies, nor was it given to them as individuals, but to the institutions; and it would not be consistent with the will of the testatrix to say that her gift should be enjoyed otherwise than according to the rules of the institutions.

It could not have been the intention of the testatrix that some fifteen or twenty ladies should take and spend her property for their own purposes, instead of for the purposes of the institutions in continuity and without limit. As to these institutions not being charities, it may be remarked that it has not been decided that it is not charity except it be for the use of the general public. The case of *Jones* v. *Williams* (4) does not apply here; nor does the decision in *Ommanney* v. *Butcher* (5) bear upon the case. The

(1) 7 H. L. C. 124.
(2) 1 Ph. 185.
(3) 1 Ves. Sen. 534.
(4) Amb. 651.
(5) T. & R. 260.

V.-C. W. 1871 COCKS v. MANNERS.

same may be said of *Attorney-General* v. *Whorwood* (1), *Doe* v. *Copestake* (2), and *Doe* v. *Aldridge* (3).

It is very difficult to maintain the proposition that the gift is not charitable because it is incapable of being administered by this Court; but, in fact, the objects of one of the institutions are charitable in every sense of the term, and as to the other, it is, in the view of the testatrix, a religious one, and there can be no doubt that the general objects of it are charitable. As to both institutions, the gifts wholly fail, because they tend to create perpetuities; but if that be not so, then they fail, so far as they are for charitable purposes, to the extent of the impure personalty.

SIR JOHN WICKENS, V.C.:—

The questions in this case arise with regard to different institutions, which stand on entirely different grounds legally. The community of sisters at *Selley Oak* is, in point of law, a voluntary association for the purposes of teaching the ignorant and nursing the sick; and I cannot distinguish it in this respect from any of the numerous voluntary associations established in *London*, such as the Scripture Readers, Home Missionaries, or Anglican Sisters of Mercy, in which zealous persons unite for the purpose of performing charitable functions, taking out of the funds of the association so much as is necessary for their own wants, and extending their operations as their means permit. It is true that, in a religious point of view, these nuns have a *quasi*-corporate existence. But in a legal point of view they are a mere voluntary association like those I have mentioned. It is said that the entire body can dissolve themselves and divide the property. That is true, I think, with regard to the *Selley Oak* sisters only in the same sense in which it is true of the voluntary associations to which I have referred. As regards what the testatrix intended, it is more probable in this case that she was thinking of the workers, and not of the work, than if the gift had been to an association for the purpose, for instance, of nursing sick children; but it would be wholly unsafe to rely on this as a ground of distinction. To hold this to be other than a charitable institution,

(1) 1 Ves. Sen. 554. (2) 6 East, 328. (3) 4 T. R. 264.

or the gift other than a charitable gift, would be to act upon a distinction too subtle to be admissible as a ground of judicial decision.

As regards the Dominican convent the case is a little different, and more difficult. There are two questions, whether the gift is a charitable gift, and whether it is good if it be not charitable. A charitable gift in English law is a gift such as is described in the preamble of the statute 43 Eliz. c. 4, or as can be considered as analogous to the gifts there described. The preamble has received a very wide construction, but it is difficult to help feeling that such a gift as that to the Dominican convent in the present case is not only not within the words of the statute, but probably, and without reference to the faith professed, one of the last gifts which the Legislature which passed the Act would have thought of including in it. On the Act unaffected by authority I should certainly hold that the gift to the Dominican convent is neither within the letter nor the spirit of it; and no decision has been referred to which compels me to adopt a different conclusion. A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word "charitable" is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public; an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable. Therefore the gift to the Dominican convent is not, in my opinion, a gift on a charitable trust. The question remains whether the gift to the Dominican convent, which seems to me not charitable, is void for perpetuity. It is argued that it is a gift in trust for the purposes of a perpetual institution, and, therefore, on a perpetual trust, and *Carne* v. *Long* (1) is relied upon. That case does not, I conceive, decide that a gift to a perpetual institution not charitable is bad—for instance, a gift to a club, or to a limited company; but merely that the gift in question there was a gift which the trustees

(1) 2 D. F. & J. 75.

V.-C. W. 1871 COCKS v. MANNERS.

could only give effect to by holding the property (which seems to have been all real estate) for ever, and applying the income according to the rules. Nothing of that sort is directed here; the gift is ordered to be paid to the superior for the time being; and the superior, when she receives it, will be bound to account for it to the convent—to put it, so to speak, into the common chest; but when there it will be subject to no trust which will prevent the existing members of the convent from spending it as they please. It would, I conceive, be an extreme stretch of the rule against perpetuity to hold that it applies to a gift of this sort. Therefore I hold the gift to the Dominican convent to be simply good; and the other gift to be good as to pure personalty only, but not as to the impure personalty.

Solicitors: Mr. *J. H. Scott;* Mr. *Elgood,* agent for Mr. *J. A. Mew, Newport, Isle of Wight;* Mr. *Sismey,* agent for Mr. *Arnold, Gravesend;* Messrs. *Harting & Son.*

V.-C. W. 1871 *July* 27.

BROWNE *v.* COLLINS.

Partnership—Profits—Income—Capital—Practice.

Partnership articles provided that meetings of the partners should be held, and the profits should be divided annually. The partners, when reduced to two—the testator being one of them—met and resolved that the accounts should be made up half-yearly, in March and September. The meetings of the partners were held very irregularly, but when they took place it was the practice of the partners to examine the accounts, and to pass a resolution disposing of the profits, and until the passing of such resolution the profits were not carried to the separate credits. The testator, who died in August, 1869, by will declared that from the day of his decease the annual income arising from his residuary personal estate should belong, in effect, to *A. B.* for life, and that for that purpose the clear profits arising from his partnership should be considered as annual income, and be paid to *A. B.* for life.

In December, 1869, at a meeting of the surviving partner and an executor of the testator they resolved that the profits for the year ending March, 1869, should be divided; and the testator's share was carried to the credit of his account under date 30th of September, 1869, and it was, in December, 1869, paid to his executors. At a meeting of the same two persons in March, 1870, they ordered the profits for the half-year ending September, 1869, to be divided, and the testator's share was paid to his executors. In taking the

account in Chambers a question arose whether these shares of the testator should be distinguished as capital or as income, and *A. B.* presented a Petition, under the statute 15 & 16 Vict. c. 80, asking for the opinion of the Court:—

Held, that the profits for the year ending March, 1869, were capital, and belonged to the testator's estate; and that the profits for the half-year ending September, 1869, were income, and belonged to *A. B.*

Semble, a Petition in an administration suit, to obtain the opinion of the Court as to the principle on which the accounts ought to be taken, for the guidance of the Chief Clerk, is not irregular.

THIS suit was instituted in March, 1870, for the administration of the real and personal estate of *William Henry Forman*, who died on the 28th of August, 1869; and on the 2nd of July, 1870, a decree was made whereby it was declared that the trusts of his will and codicil ought to be carried into execution, and inquiries and accounts were directed and ordered. One direction was, that in taking the accounts "capital" should be distinguished from "income." The Chief Clerk's separate certificate of the 24th of June, 1871, shewed that by deed, in May, 1816, partners, consisting of five persons, and carrying on ironworks in *Monmouthshire*, covenanted, *inter alia*, that the name of the works should be the "*Tredegar Ironworks*," and that the firm or style of the company should be "*Samuel Homfray & Co.*," during the life of *Samuel Homfray*, and after his death the "*Tredegar Iron Company*;" that the capital of the company of £120,000 should always be considered to consist of twenty-four shares of £5000 each; that the manager of the works should make out in the best manner that the circumstances would permit a monthly account of all the iron made, and of the state of the profits and losses of the company during each month, and should, before the end of every succeeding month, send a copy of such account to every partner; that the partners should meet once in every year at the works between the 1st of August and the 1st of October, at which meeting the general affairs and transactions of the company should be looked into and the accounts examined; that on the last Saturday in March in every year a general account and rest in writing should be made by the manager of all business transacted in the course of the preceding year, and a copy of the same be sent to each of the partners before the 1st of July following; and that, after interest on the capital had been provided for, the profits which should arise from the

V.-C. W. 1871

BROWNE v. COLLINS.

business of the company should, on the last day in the first week of January following, be divided and paid between and to the partners.

W. H. Forman had some time before his death become, under the provisions of the deed of May, 1816, entitled to eighteen and a half of the twenty-four shares in the company; and another partner was entitled to the remaining five and a half shares. To the year 1845, annual meetings of the partners were held. From that year to 1854 no annual meeting of the partners was held; but in July, 1854, a meeting of the partners was held, and they resolved that the accounts of the partnership should be in future made up half-yearly, at the end of March and the end of September. In accordance with that resolution the accounts had been made up half-yearly, and copies sent about three months after to the partners; but the meetings of the partners were held very irregularly, in some years no meeting being held. When the meetings did take place, it was the practice of the partners to examine and approve of the accounts, and to pass a resolution disposing of the profits, and thereupon entries were made in the books of the partners appropriating the profits according to the terms of the resolution; but until after the passing of such resolution no entries were made in the books of the partnership carrying any part of such profits to the separate credit of either partner.

On the 23rd of December, 1868, a meeting (the only one in that year) of the two partners (*W. H. Forman* being represented by a Mr. *Hardy*) was held. They resolved that the accounts to the 30th of September, 1867, and the 31st of March, 1868, be approved; and the accumulated profits to the 31st of March, 1868, appearing to be £20,722, they ordered that sum, with a balance of 8*s.* 11*d.*, to be carried to the account of profit and loss in the ledger, and a dividend of £860 a share to be carried to the cash account of each partner, with interest at 5 per cent., on the 1st of January, 1869.

For the half-years ending the 30th of September, 1868, and the 31st of March, 1869, accounts were made up shortly after those dates, and were, about three months after, sent to the partners; but no meeting of the partners was held in *W. H. Forman's* lifetime subsequently to that of the 23rd of December, 1868.

On the 3rd of December, 1869, a meeting of the partners was held, Mr. *Hardy*, as one of the executors of *W. H. Forman*, and the other partner being present. They resolved that the accounts of the partnership for the half-years ending the 30th of September, 1868, and the 31st of March, 1869, be approved; and ordered that the profits for the year ending the 31st of March, 1869, viz., the sum of £22,239 8*s.* 1*d.* (with a balance of £83 1*s.* 1*d.*) be carried to the account of profit and loss in the ledger, and that it be divided between the partners. The sum of £17,206 17*s.* 11*d.* was then (December, 1869) carried to the credit of *W. H. Forman's* account under date of 30th of September, 1869; and the same was, in December, 1869, paid to his executors.

No account of the profits of the partnership to the 30th of of September, 1869, was, for any part of the half-year ending at that date, made up in *W. H. Forman's* lifetime; but an account was shortly after that date made up and sent to the executors of the surviving partner. The next meeting of the partners was held on the 9th of March, 1870, and they (Mr. *Hardy* and the surviving partner) approved of the accounts, and ordered the profits (£30,947 11*s.* 8*d.*) for the half-year ending the 30th of September, 1869, to be carried to the account of profit and loss in the ledger and to be divided between the partners. The sum carried to the credit of the executors of *W. H. Forman* was £23,855 8*s.* 7*d.*, under the date of the 1st of October, 1869, with interest at 5 per cent. from that date; and the sum of £23,855 8*s.* 7*d.* was, shortly after the 9th of March, 1870, paid to the executors.

W. H. Forman, by will in April, 1860, after appointing three trustees and executors, bequeathed all his capital and other moneys employed in any partnership, and all his personal estate, unto them upon trust, in their absolute discretion, to permit the same to continue in the state in which the same should be at his decease, or to convert into money any part of his personal estate, and also to carry on his business of an iron merchant, or any other business in which he should be engaged; and, after authorizing his trustees to make investments of certain funds, the testator said: "And I further direct and declare that from the day of my decease the annual income arising from my residuary personal estate shall belong to the person for the time being beneficially

V.-C. W. 1871 BROWNE v. COLLINS.

entitled in possession to my residuary real estate; and for this purpose the net or clear profits arising from my partnership or other commercial undertaking which may be carried on for the benefit of my residuary personal estate . . . . shall be deemed and considered as annnal income . . . . and go and be paid accordingly to the tenant for life." The testator devised the residue of his real estates unto the three trustees, their heirs, &c., to the use of his nephew *A. H. Browne* for life, with remainder to the use of his first and other sons in tail, with remainder over. The executors had since the death of the testator carried on the ironworks in conjunction with the surviving partner.

By deed, dated the 28th of December, 1869, made between *A. H. Browne* and his father, *A. Browne*, and a third party, *A. H. Browne* assigned an equal moiety of all the income which under the trusts of the will had, since the death of the testator, accrued and become payable, and should, during the joint lives of himself and the Defendant *A. Browne*, accrue or become payable in respect of the residuary personal estate, upon trusts not material to be stated.

In taking the account of the personal estate questions of difficulty arose as to whether the two sums of money mentioned should be distinguished as "capital" or "income" of the testator's personal estate, or were to be to any and what extent apportioned between such capital and income; and it being necessary, in order to facilitate the taking of such account, to obtain the opinion and direction of the Court on the subject, this Petition was presented, under the provisions of the 15 & 16 Vict. c. 80, ss. 29, 33, by *A. H. Browne*, the tenant for life in possession of the residuary real estates, and the person beneficially entitled in possession to the income of the residuary personal estate, praying that the Court would be pleased to declare its opinion whether, having regard to the facts of the case and the declarations contained in the will, the several sums of £17,206 17*s.* 11*d.* and £23,855 8*s.* 7*d.* respectively, ought, in taking the accounts of the personal estate of the testator, to be accounted for and distinguished as parts of the "capital" of the personal estate not specifically bequeathed, or as parts of the "income" of such estate, or ought to any and what extent to be apportioned between such capital and income.

There was in the certificate a third sum of £4152 12*s.* 1*d.*, which was a dividend on railway shares; but it was, upon the authority of *Bates* v. *Mackinley* (1), admitted, without argument, that it belonged to the Petitioner, the tenant for life.

Mr. *Greene*, Q.C., and Mr. *W. Pearson*, for the Petitioner:—

The question for decision is brought before the Court by Petition under provisions in the *Master in Chancery Abolition Act* (15 & 16 Vict. c. 80), and not, as is generally done, on motion. This is a convenient practice, and is not irregular: *Robertson* v. *Norris* (2). It is submitted that what may be done on motion may be done on petition. At any rate, no objection is raised to this Petition. The articles of partnership must determine how the profits in question are to be dealt with. Those articles provide that the partners shall meet once a year for the purpose of examining the accounts, and also that the profits shall be divided and paid between and to the partners in the month of January in each year. The practice of the partners in regard to their meetings was always very irregular. In 1854 the two surviving partners passed a resolution that the accounts should in future be made up half-yearly, but their meetings were as irregularly held as formerly; still they did take place, and then it was, and not before, that the profits were disposed of and appropriated by resolution to the separate credit of each partner. The period, whether it was annual or shorter, when they met to give their assent, as partners, to the moneys being treated as profits was the period of division; and although the profits may have accrued at an earlier period, they could be dealt with as profits only at the time of meeting.

The testator died in August, 1869, and on the 3rd of December following a meeting of the partners took place, and the sum which was carried to the credit of the testator's account under the date of the 30th of September, 1869, ought to be paid to the Petitioner. That sum, according to one of the most recent cases, must be treated as the income, and not as the capital, of the testator: *Ibbotson* v. *Elam* (3). There is in the will nothing that is opposed to this contention. The testator knew the terms of the articles, and

(1) 31 Beav. 280. (2) 1 Giff. 428.
(3) Law Rep. 1 Eq. 188.

V.-C. W. 1871 BROWNE v. COLLINS.

that the profits could not be ascertained and divided till they had been complied with. Certainly the profits which accrued up to the half-year ending the 30th of September, 1869 (after the testator's death), belong to the Petitioner; but, in fact, there is no substantial distinction between this partnership and that of an ordinary company. The principle laid down in *Ibbotson* v. *Elam* (1) ought to be followed, and therefore it is submitted that both the sums in question belong to the tenant for life (the Petitioner).

[They also referred to *Bates* v. *Mackinley* (2), *Clive* v. *Clive* (3), *Johnston* v. *Moore* (4).]

Mr. *Freeman*, for the Respondent *A. Browne*, also submitted that, as to the sum of £23,855 8*s.* 7*d.*, the question was covered by the decision in *Ibbotson* v. *Elam*, and that as to the sum of £17,206 17*s.* 11*d.* no substantial distinction could be drawn. He cited *In re Barton's Trusts* (5).

Mr. *Dickinson*, Q.C., and Mr. *Lowndes*, for the first tenant in tail, an infant:—

Neither of these sums belongs to the Petitioner, but they both belong to his infant son as corpus, and this view is supported by the decisions in *Clive* v. *Clive*, *Wright* v. *Tuckett* (6), and *De Gendre* v. *Kent* (7). The meetings of the partners were arranged merely to suit their convenience, and they did not affect the rights of the parties to the profits when made. The right to the profits was one thing, and the right to receive them was another, and in this case all these profits belong to the infant.

Mr. *Karslake*, Q.C., Mr. *Homersham Cox*, and Mr. *Tapp*, for the trustees.

Mr. *Greene*, in reply:—

The case of *De Gendre* v. *Kent* is an authority in favour of the Petitioner. At the moment when the partners met to declare what were profits, and to divide them, was the time when they

(1) Law Rep. 1 Eq. 188.
(2) 31 Beav. 280.
(3) Kay, 600.
(4) 27 L. J. (Ch.) 453.
(5) Law Rep. 5 Eq. 238.
(6) 1 J. & H. 266.
(7) Law Rep. 4 Eq. 283.

were severed from the capital. The arrangement that the accounts should be made up half-yearly was verbal. The testator was still bound by the articles of partnership; and until the partners had declared the profits they had no right to any. The testator could not have filed a bill to have the profits declared; and as they were not declared till after his death, they belong to the Petitioner.

SIR JOHN WICKENS, V.C.:—

I do not think that I can distinguish this case from that of an ordinary partnership, and, if it be considered as such, the principles and doctrines applicable to it seem clear enough. In every partnership business the losses of one day go against the profits of the next. The losses are not really made on the day on which they are discovered or definitely ascertained, nor the profits made on the day on which the moneys come in. In every partnership it is found convenient to take conventional periods, yearly or half-yearly, for the particular purpose of ascertaining losses and profits; or, in other words, the partnership time is separated into defined periods, in regard to which it is considered that losses and profits can be ascertained without any risk of extreme error. I consider that until the whole of a period has passed not a farthing of profit has been earned; and this seems to accord with the view of the Master of the Rolls in the case of *Ibbotson* v. *Elam* (1). Therefore, in respect to the sum of £23,855 8*s.* 7*d.* mentioned in the Petition, I think that the tenant for life is clearly entitled to it as profits which accrued up to the 30th of September, 1869. But as regards the sum of £17,206 17*s.* 11*d.*, I am of opinion that, on principle, it is all capital. It is the amount of profits made during a conventional period, which was wholly included in the testator's lifetime, though those profits were not ascertained till some time after his death. It seems to me that what was said in the case of *Clive* v. *Clive* (2) warrants me in holding that, on principle, a delay in the mechanical process of ascertaining the profits ought not to prevent them from being attributed as profits to the period to which they were referred. Suppose that in an ordinary partnership the partners are, or one of

(1) Law Rep. 1 Eq. 188, 35 Beav 594. 12 Jur (N.S.) 114 (2) Kay, 600.

V.-C. W. 1871 BROWNE v. COLLINS.

them is, indolent, or unwilling, or so perverse as to refuse, to settle the accounts, or that there is such a nice question of principle as to make it requisite that the partners should agree to a special case, which might eventually come before the House of Lords. There might in such a case be a delay of many years; but I do not think the rights of the parties would be altered, nor the character of the profits. It has been said that the profits of one half-year may be lost in the next half-year. Of course that is possible. If the profits earned in the half-year—say, up to the end of June—be not divided till after the half-year ending the 31st of December in any year, and there has been such a loss in the latter half-year as to swallow up the profits of the former half-year, and something more, would that affect the present case? If the profits of one half-year go to pay the losses of a preceding half-year, they go in discharge of a capital sum which the partners would otherwise have had to pay out of their own pockets. Profits of any half-year paid to a partner are capital in his pocket. Losses of any half-year in so far as contributed to by a partner are capital out of his pocket. Why should the possibility that the former, before they get into a partner's pocket, may be stopped to pay the latter, make them less capital? But, even if it were so, that possibility can hardly operate when the second period has passed without any losses, and when there is no necessity for making a stoppage. No doubt partners may enter into articles excluding the operation of this principle—that is to say, the articles may import that the profits of one conventional period shall not be considered as accruing at a time other than at the time at which they actually become payable; but it would require very express words to do this, and I find no such words in this case. Nor do I find anything in the will of this testator to exclude the operation of the principle to which I have referred. Indeed, so far as the will bears upon it, it is, I think, in the Petitioner's favour. The only question is, whether the authorities compel me to adopt a view different from this. The case of *Clive* v. *Clive* (1) was that of an incorporated company, and in such a company a shareholder has no interest in the property as such, or the profits as such, but stands outside, as it were, and has dividends ascertainable on a particular principle, and payable at a particular

(1) Kay, 600.

time, and he has no inchoate or other right till the dividends have been declared. The case of *Bates* v. *Mackinley* (1) was treated as one of an incorporated company, and the same remark applies to the case of *In re Barton's Trusts* (2), though that case is not really in point. The case of *Johnstone* v. *Moore* (3) is not so reported that it can be safely acted on. Upon the whole, I cannot find any decided case which prevents me from following what I think is the true principle—namely, that which is stated in the case of *Clive* v. *Clive* (4); and therefore my opinion is, that the tenant for life is entitled to the whole of the profits declared to have accrued up to the 30th of September, 1869, and that the profits of the previous period (to the end of March, 1869) must be carried to the corpus of the testator's estate.

Solicitors: Messrs. *Kingsford & Dorman;* Mr. *T. W. Denby;* Mr. *J. H. Cotterill.*

(1) 31 Beav. 280. (3) 27 L. J. (Ch.) 453.
(2) Law Rep. 5 Eq. 238. (4) Kay, 600.

C. J. B.
1871
June 7, 17.

Ex parte MATHEWS.
In re CHERRY.

Practice—Costs of successful Appellant.

The Court of Bankruptcy follows the rule of the Court of Chancery as laid down in *Denny* v. *Hancock* (1); and will not, as a matter of course, give the costs of an appeal to a successful Appellant.

IN this case, which came before the Court on the 7th of June, the Chief Judge reversed the decision of the County Court Judge of *Liverpool*, and directed the Respondent to pay the costs of the appeal; but, on the application of counsel for the Respondent, the Chief Judge withheld that part of his order which related to the costs of the appeal, in order that that point might be more fully argued, which was accordingly done on the 17th of June.

Mr. *Little*, Q.C., for the Respondent:—

This Court will follow the rule of the Court of Chancery, as laid down in the recent case of *Denny* v. *Hancock* (1). In *Stannard* v. *Lee* (2) Lord Justice *James* says: "We will never give the costs of a successful appeal where there has been no misconduct on the part of the Respondents." In the case of *Ex parte Birmingham Gaslight and Coke Company* (3), no costs were given to the successful Appellant; the rule of the Court of Chancery as to this point is laid down in *Daniell's* Chancery Practice (4).

Mr. *De Gex*, Q.C., for the Appellant:—

An appeal in the Court of Chancery is a rehearing before another branch of the same Court. An appeal from a County Court to this Court is an appeal to a different Court, and is precisely similar to an appeal from a County Court to one of the Superior Courts at *Westminster*. The rule, therefore, which is adopted by the Courts at *Westminster*, and not the rule of the Court of Chancery, should be followed by this Court in granting or not granting the costs of a successful appeal.

(1) Law Rep. 6 Ch. 138.
(2) Ibid. 346, 350.
(3) Law Rep. 11 Eq. 204.
(4) 4th Ed. p. 1384.

The Court of Chancery sometimes makes the Respondent pay the costs of the appeal: *Powell* v. *Lovegrove* (1); *Collins* v. *Burton* (2); *Ex parte Cole and Attwater* (3). The Court of Queen's Bench, in *Mountnoy* v. *Collier* (4), held that the general rule was to give a successful Appellant the costs of the appeal, although the rule was not inflexible. In *Outhwaite* v. *Hudson* (5), in the Court of Exchequer, *Parke*, B., said: "We have laid it down as a general rule to allow the successful party his costs of appeal. . . . . It is not, of course, an inflexible rule." And so in *Conybeare* v. *Farries* (6), where the same Court held that the costs of the appeal were in the discretion of the Court. The Court of Common Pleas, in *Leiedmann* v. *Schultz* (7), laid it down as an inflexible rule always to give the costs of an appeal from a County Court to a successful Appellant; and in *Schroder* v. *Ward* (8) the same rule was again laid down by the same Court. The rule in the Privy Council is, that the costs shall abide the event.

SIR JAMES BACON, C.J.:—

Although I am of opinion that the rule laid down by the Lords Justices in the recent case of *Denny* v. *Hancock* (9), and declared by them to be the ordinary rule of the Court of Chancery, is a very hard rule—for the successful Appellant must be considered to have been prosecuting a righteous cause—and, notwithstanding the practice of the Common Law Courts and the Privy Council, yet I think I am bound to follow that rule. I must, therefore, refuse to give the Appellant in this case the costs of the appeal, as no misconduct has been proved against the Respondent.

Solicitors for the Appellant: Messrs. *Turner & Turner*, for Messrs. *Dodge & Phipps, Liverpool.*

Solicitors for the Respondent: Messrs. *Chester & Urquhart*, for Messrs. *Lace, Banner, & Co., Liverpool.*

(1) 8 D. M. & G. 357.
(2) 4 De G. & J. 612.
(3) 3 D. J. & S. 380.
(4) 1 E. & B. 630.
(5) 7 Ex. 380.
(6) Law Rep. 5 Ex. 16.
(7) 14 C. B. 38.
(8) 13 Ibid. (N.S.) 410.
(9) Law Rep. 6 Ch. 138.

C. J. B.
1871
July 31.

Ex parte HOMAN.
In re BROADBENT.

Bankruptcy—Bill of Sale executed before, but registered after, the filing of a Petition for Liquidation—Claim by Trustee—Apparent Possession—Order and Disposition.

7 Ch 641.
15 Eq 223-5-6-7
8 Ch 648.
5 Ch D 743.
10 Ch D 319
18 Ch D 34

An agreement to give a bill of sale need not be registered under the *Bills of Sale Act* (17 & 18 Vict. c. 36).

Where a bill of sale was executed in July, 1870, in accordance with an agreement made in October, 1868, and the grantor filed a Petition for liquidation on the same day, but after the execution of the bill of sale, and the bill of sale was registered within twenty-one days:—

Held, that the title of the holder of the bill of sale prevailed over that of the trustee.

Goods in the possession of a person at the time of his bankruptcy subject to a bill of sale which entitles him to possession until demand of debt and default, are not in his order and disposition.

Ashton v. *Blackshaw* (1) followed.

THIS was an appeal from an order of the County Court Judge at *Bradford*, dated the 5th of May, 1871, dismissing with costs an application made by the trustee under the bankruptcy, for an order that a "certain indenture or a bill of sale of furniture and other effects, being on the 7th day of July last in and about the dwelling-house of the bankrupt, situate at *Holme House, Clayton*, in the parish of *Bradford*, purporting to have been executed by the bankrupt in favour of *Gilson Homan* (the Respondent) on the 7th day of July last, be declared fraudulent and void within the intent and meaning of the *Bankruptcy Act*, 1869, as being a transfer or assignment to the said *Gilson Homan* by way of fraudulent preference over the other creditors of the said bankrupt, and made by him in favour of the said *G. Homan* at a time when he was unable to pay his debts as they became due from his own moneys, and for payment over to the said trustee of the whole of the proceeds of the sale made on behalf of the said *G. Homan* of the said furniture and other effects of the said bankrupt on the 18th day of July last, and such further sum, if any, as should be proved by the Court to be the difference between the value of

(1) Law Rep. 9 Eq. 510.

the said goods and the proceeds of the said sale, and also all costs and damages that might be incurred by the trustee by reason of such sale: and for a further order, declaring that the said goods, or the proceeds thereof, were and are a part of the estate of the bankrupt divisible among his creditors, the said goods being at the commencement of the said bankruptcy, with the consent and permission of the said *G. Homan*, in the order and disposition of the said bankrupt, and for payment to the said trustee of the costs of and incidental to that application, and to the carrying out of any order which the Court should think fit to make therein."

It appeared from the evidence that in September, 1868, the bankrupt, being in difficulties, entered into an agreement with his creditors (of whom the Respondent, then a member of the firm *Thornton, Homan, & Co.*, was one) to pay them a composition of 2*s.* 6*d.* in the pound. The bankrupt finding himself unable to carry out this agreement applied to *Thornton, Homan, & Co.* to allow their dividend to stand over, and to advance him a sum sufficient to pay his other creditors their composition of 2*s.* 6*d.* *Thornton, Homan, & Co.* accordingly agreed to postpone the payment of their dividend, and at the same time advanced a sum of £230 to the bankrupt, who accordingly wrote to *Homan* the following letter:—

"*Gilson Homan*, Esq., *Bradford.* *Bradford*, Oct. 30, 1868.

"Dear Sir,—I hereby engage to execute, when required by you to do so, a bill of sale upon my furniture in consideration of your advance of £230 towards payment of my dividend.

"I am, dear sir, yours faithfully,

"*R. W. Broadbent.*"

The bankrupt also agreed to transfer to the firm of *Thornton, Homan, & Co.* his interest in certain consignments to *China* which had been sent out by *Hardy, Nathan, & Sons*, and to carry this arrangement out he wrote the following letter to that firm:—

"Messrs. *Hardy, Nathan, & Sons,* *Bradford*, Oct. 27, 1868.
"*Bradford.*

"Dear Sirs,—On receipt of the account sales and returns for the goods which you have shipped on my account, I will thank you to hand over to Messrs. *Thornton, Homan, & Co.*, of this town,

C. J. B. 1871 *Ex parte* HOMAN. *In re* BROADBENT.

the balance which may be in my favour, to be placed to my credit by them.

"I am, dear sirs, yours faithfully,

"*R. W. Broadbent.*"

And *Thornton, Homan, & Co.*, received the following communication on the subject from that firm:—

"Messrs. *Thornton, Homan, & Co.*, *Bradford*, Oct. 28, 1868.

"*Bradford.*

"Gentlemen,—We have received a letter from Mr. *R. W. Broadbent*, requesting us to pay over to you any balance that may be in his favour arising out of his consignments to our firm. We herewith engage ourselves to comply with his request as soon as we shall have received account sales, and remain, gentlemen,

"Yours respectfully,

"*Hardy, Nathan, & Co.*"

In accordance with the last two letters two payments were made to *Thornton, Homan, & Co.* (one of £48 16*s.* 4*d.* in December, 1869, and one of £114 19*s.* 6*d.* in May, 1870), but they were not sufficient to pay the dividend due to the firm, which amounted to £175 12*s.* 6*d.*

Thornton, the other partner in the firm of *Thornton, Homan, & Co.*, having died in the beginning of 1870, the Respondent carried on the business by himself, and being uncertain as to the value of the bankrupt's interest in the *China* consignments, refrained from acting on the letter of the 30th of October, 1868, until after the payment of £114 19*s.* 6*d.* in May, 1870.

Finding, however, that the sum receivable on account of those consignments was insufficient to pay the dividend due to his firm, and hearing about the same time that the bankrupt was again in difficulties, he instructed his solicitor, about the 4th of July, 1870, to prepare the bill of sale, and on the 7th of July it was executed by the bankrupt, acting under the advice of his own solicitor. The bill of sale contained the following clauses:—

15 Eq 227

"Provided also that, until default shall be made in payment of the moneys intended to be hereby secured, or of the interest thereof, or of some part thereof respectively, contrary to the proviso hereinbefore contained, it shall be lawful for the said *R. W. Broadbent*,

his executors, administrators, or assigns, to have and retain the possession and use of the said goods, chattels, and premises, and every part thereof, without any let, hindrance, or interruption whatsoever from the said *G. Homan*, his executors, administrators, and assigns: Provided also, and it is hereby agreed and declared that, if default shall be made in payment of the said sum of £232 16*s.* 8*d.*, or the interest for the same, on demand being made as aforesaid, it shall be lawful for the said *G. Homan*, his executors, administrators, or assigns, at any time thereafter, while any money shall remain owing on the security of these presents, to enter into and upon the said dwelling-house, or any dwelling-house, messuage, or tenement for the time being occupied by the said *R. W. Broadbent*, his executors, administrators, or assigns, in which any of the said goods, chattels, and premises shall be, and to seize and take and keep possession of the same, or any part thereof; and immediately upon entering into and taking such possession as aforesaid, or at any time or times thereafter, at his or their discretion, without any further consent on the part of the said *R. W. Broadbent*, his executors, administrators, and assigns, to sell and dispose of the said goods, chattels, and premises hereinbefore expressed to be hereby assigned, or any part thereof, by public auction or private contract, and either together or in lots, and subject to such conditions and in such manner as the said *G. Homan*, his executors, administrators, or assigns shall think fit, with full power to buy in and rescind any contract for sale, and to resell, without being responsible for any loss arising therefrom; and, for all and for any of the purposes aforesaid, to execute and do all such acts, contracts, and assurances as he or they shall think proper."

On the same day (the 7th of July), but after the execution of the bill of sale, the bankrupt presented a Petition for liquidation. On the 8th of July a demand for payment of the money was made in accordance with the terms of the bill of sale, and default in payment being made, possession was taken on the same day; the goods were not removed till the 14th and 15th of July, and were sold by auction on the 18th and 19th of that month. The bill of sale was registered on the 19th of July. On the 2nd of July a debtor summons had been served on the bankrupt, on which he was adjudicated bankrupt on the 26th of that month; and on the 25th

C. J. B. 1871 *Ex parte* HOMAN. *In re* BROADBENT.

of July, at a meeting of creditors held under the Petition for liquidation, it was resolved that the affairs of the bankrupt should be wound up in bankruptcy and not by liquidation, and *Blackburn* was appointed trustee.

Mr. *Bagley*, for the Appellant :—

The bankrupt was in possession of the goods assigned by the bill of sale at the commencement of the bankruptcy, namely, the presentation of the Petition for liquidation, and the bill of sale was not then registered; the goods, therefore, pass to the trustee. Goods assigned by a trader, with a stipulation that he shall retain possession till default, are in his order and disposition, with the consent of the true owner, within the meaning of the bankrupt laws: *Freshney* v. *Carrick* (1); *Spackman* v. *Miller* (2). An agreement to give a bill of sale ought to be registered, otherwise the very object of the *Bills of Sale Act* is defeated.

Mr. *Reed*, for the Respondent, was not called upon.

SIR JAMES BACON, C.J. :—

The question involved in this case carries the rights of a bill of sale holder to their greatest limit. On the 7th of July the bankrupt, having then committed no act of bankruptcy, and being, therefore, perfect master of his property, gives a bill of sale over his furniture to the Respondent; and there is no ground, in my opinion, for saying that the bill of sale was a fraudulent preference, as it was given on request and in accordance with a previous agreement. I cannot find any authority, nor can Mr. *Bagley* refer me to one, for his statement, that an agreement to give a bill of sale must be registered, and I cannot enlarge the Act to that extent.

The bill of sale accordingly being given on the 7th of July, at a time when the bankrupt had a perfect right to give it, and being registered on the 19th of July, within the twenty-one days required by the *Bills of Sale Act*, I am of opinion that the claim of the holder of it is good as against the trustee. According to the recent case of *Ashton* v. *Blackshaw* (3), the order and disposition

(1) 1 H. & N. 653. (2) 12 C. B. (N.S.) 659.
(3) Law Rep. 9 Eq. 510.

clause of the *Bankruptcy Act* does not apply. I found my judgment on the ground that the bill of sale, being given by the bankrupt at a time when he had a perfect right to give it, and being registered within twenty-one days, is a good bill of sale according to the Act.

The appeal, therefore, must be dismissed. The Respondent will have his costs out of the estate.

Solicitors for the Appellant: Messrs. *Williamson, Hill, & Co.*, agents for *Walter Thomas, Halifax.*

Solicitors for the Respondent: Messrs. *Field, Roscoe, & Co.*

V.-C. S.
1871
March 4.

WILKINSON *v.* WILKINSON.

Will and Codicil—Gift of Residue for Life—Residence—Void Condition.

11 L.T.N.S. 965

Testatrix, by her will, in 1867, gave the residue of her property to her niece, the wife of *W. W.* (who was carrying on a large business as a corn miller at *S.*) for life, with gifts over; and by a codicil, in 1869, she directed that all interest given by her will to her niece should go over, should she not cease to reside in *S.* within eighteen months of testatrix's death:—

Held, upon the authority of *Mitchel* v. *Reynolds* (1), that, as this was a condition which would require the niece to omit the doing of something that was a duty, it was void.

SPECIAL CASE.

Elizabeth Musgrave, who died on the 23rd of July, 1869, by her will, dated the 22nd of March, 1867, after directing that her debts and funeral and testamentary expenses should be paid, bequeathed a specific legacy unto her niece *Elizabeth Wilkinson*, the wife of *William Wilkinson* the younger, of *Skipton*, corn miller, absolutely; and after bequeathing all the residue of her personal and real estates unto her said niece, and to *William Wallis*, their heirs, executors, administrators, and assigns, upon certain trusts, as to two sums in favour of a son and daughter of her said niece and their children, and as to the ultimate residue for the benefit of *Elizabeth Wilkinson* for life, and for that of her children and remoter issue, but only on the condition that she should, from the time of the testatrix's death, take upon herself the office of trustee and executor under the will, and continue to act therein until incapacitated otherwise than by voluntary retirement from the trust, the testatrix declared that the observance of the condition should be a condition precedent to such trusts in favour of *Elizabeth Wilkinson* and her children and remoter issue taking effect; that in case *Elizabeth Wilkinson* should fail to keep or observe the said condition, the said trusts for her benefit and the benefit of her children and remoter issue should cease and be at an end; that the trust for the benefit of the daughters and sons of her nephew, *J. M. Sagar-Musgrave*, should immediately thereupon

(1) 1 P. Wms. 181.

come into force and operation; and that the interest of *Elizabeth Wilkinson* should be separate estate, and without power of anticipation.

The testatrix, by a codicil dated the 7th of June, 1869, said: "I direct all interest given by my said will to my niece *Elizabeth*, the wife of *William Wilkinson*, shall pass as in my said will named in case of her death, should she not cease to reside in *Skipton* within eighteen months of my death."

Elizabeth Wilkinson and *William Wallis* proved the will, and took upon themselves the office of trustees.

At the time of the dates of the will and codicil, and at the time of the death of the testatrix, *William Wilkinson* and *Elizabeth* his wife were residing at *Skipton*, and he, with a brother, was carrying on a large corn miller's business there, and it was essential to the welfare of the business that he should continue to reside there, so that he might personally superintend the business.

There were three children of the marriage, of the ages of eleven, ten, and nine years.

On the 18th of January, 1871, notwithstanding her husband's objection to her residing away from *Skipton*, *Elizabeth Wilkinson* quitted his house, and went to reside in lodgings at *Liverpool*.

William Wilkinson required his wife to return to his house at *Skipton*, and she wished to do so if she could, without thereby incurring a forfeiture under the codicil.

The questions submitted for the opinion of the Court were, whether *Elizabeth Wilkinson* had complied with the direction contained in the codicil so as to entitle her to receive the interest conferred on her by the will, and whether she would incur a forfeiture under the codicil if she returned to *Skipton* and resided there.

Mr. *Dickinson*, Q.C., and Mr. *W. W. Karslake*, for the Plaintiff *Elizabeth Wilkinson*:—

The condition is one which the Court will not enforce the performance of. The wife took steps to observe it until the opinion of the Court could be obtained, as the husband refused to give up his business and to leave *Skipton*; and a condition which would

V.-C. S. 1871

WILKINSON v. WILKINSON.

deprive the wife of this property, if she does not leave her husband, is *contra bonos mores*: *Wren* v. *Bradley* (1).

If the wife should continue to live away from her husband, he will institute proceedings for restoration of conjugal rights, and the law will compel her to go and live with him. She cannot be required to act in opposition to the law.

Dunne v. *Dunne* (2) does not govern this case; but reference is made to it for the passage in the judgment, "that conditions subsequent, which operate to annul previous gifts, are not looked upon favourably." In the remarkable case of *Fillingham* v. *Bromley* (3) the persons who should be entitled to the devised estate were required to live and reside on it; and, in default, there was a gift over. The first devisees sold the estate, and the Court decreed that there had been no forfeiture.

In *Clavering* v. *Ellison* (4) a condition subsequent having reference to the education of children was held to be too uncertain to enable the Court to say what was meant; and though there had not been a strict compliance with the condition as regarded one child, the share of the child was not defeated. Here the wife has complied with the condition, though it is not a good one, because it involves the separation between her and her husband; but assuming that it is a good condition, then it has been performed sufficiently to entitle her to the property, whether she returns to her husband voluntarily or by compulsion. The condition in the will is precedent, and the language is clear and precise that she should continue in the office of trustee; but in the codicil the same language is not used, and the condition there may be said to have been so framed as to leave a door open to the wife to return to her husband—*i. e.*, having complied with the condition, it shall not apply to her whole lifetime.

[They also cited *Brown* v. *Peck* (5).]

Mr. *Graham Hastings*, for the husband, supported the contention on behalf of the Plaintiff.

Mr. *T. N. Lawrence*, for the other trustee.

(1) 2 De G. & Sm. 49.
(2) 3 Sm. & Giff. 22. 1 Jur. N.S. 176
(3) T. & R. 530.
(4) 3 Drew. 451. 2 Jur. N.S. 201
(5) 1 Eden, 140.

Mr. *Karslake*, Q.C., and Mr. *Alexander*, for the Defendants, the children of *J. M. Sagar-Musgrave*:—

The intention of the testatrix was that, during the life of the Plaintiff, she should not reside at *Skipton;* and a temporary absence, more or less prolonged, followed by a return to that place, will not be a compliance with this express condition. The property was given for her separate use. It is to be enjoyed by her as if she were discovert. If the condition in the codicil be not complied with, there will be an acceleration of the interests of the children, but the condition in the will is very different; for if the Plaintiff declined to accept the trusts, and to continue in the office of trustee, there would be a forfeiture of her interests and those of her children, though they could not compel her to accept the trusts.

Doe v. *Hawke* (1) shews that, though the wife should be compelled to return to her husband by pressure of law, the property would go over. The testatrix knew that the Plaintiff was married; and as it will be easy for the husband to consent that his wife may reside away from *Skipton*, there is nothing which makes the condition bad. The testatrix's intention was, that the husband should judge whether he would allow his wife to take this property for her separate use or not. There is no difficulty in the matter as regards the law, nor is there any upon grounds of public policy. The condition would be clearly good if the legatee were a male person; and it is submitted that, though the legatee is a married woman, it is not bad; that it is a good condition, and that it has not yet been complied with. In some of the cases cited the condition was, that the wife should live separate and apart from her husband, and that was *contra bonos mores;* but here the condition can be performed with the husband's consent, or by his living away from *Skipton*. It was clearly intended that the removal from *Skipton* should be permanent; and this was why the long period of eighteen months from her death was given by the testatrix to enable the Plaintiff to find a residence at some other place—there could be no cessation of residence without; but if any period of non-residence there would be a compliance with the

(1) 2 East, 481.

V.-C. S. 1871

WILKINSON v. WILKINSON.

condition—one day and night might be as good as one month. It will be impossible to draw a line.

SIR JOHN STUART, V.C.:—

I think this condition is void. Upon the construction of the language, it is extremely difficult to say how the condition is to be performed. The testatrix knew that the Plaintiff was married, and that her ceasing to reside at *Skipton* could not depend upon herself, but upon her husband. That being so, what is the value of such a condition? It is a condition imposed upon a person who is not the person that must really perform it. What has occurred shews its worthlessness. The Plaintiff—a married woman—considering that it was her duty to perform the condition so that there should be no forfeiture of the property, has been obliged to neglect another and more important duty in quitting her husband's house, and going to reside elsewhere. The authorities clearly shew that the condition is bad. Lord *Macclesfield*, when Chief Justice of the Queen's Bench, in the celebrated case of *Mitchel* v. *Reynolds* (1), described very clearly what are conditions which shall be considered to be invalid; and (2) he said: "All the instances of conditions against law in a proper sense are reducible under one of these heads:—1st. Either to do something that is *malum in se*, or *malum prohibitum*. 2ndly. To omit the doing of something that is a duty. 3rdly. To encourage such crimes and omissions. Such conditions as these the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes." This case comes exactly within the second definition. The condition is a vicious one; and that being so, I have no difficulty in declaring that it is void.

Solicitors: Messrs. *Jacobs & North.*

(1) 1 P. Wms. 181. (2) 1 P. Wms. 189.

In re CARR'S TRUSTS.

V.-C. M.
1871
March 10.

Husband and Wife—Income of Chattels real—Equity to Settlement—Particular Assignee of Husband.

A wife has no equity to a settlement out of arrears of past income of real or leasehold property which the husband has assigned to a particular assignee.

A husband and wife signed a memorandum charging leasehold property of the wife with the repayment of a debt of the husband. The income was paid to the assignee under the memorandum till the bankruptcy of the husband, after which it was retained and accumulated, and the accumulations were paid into Court:—

Held, that the fund in Court, having arisen from arrears of income which the husband or his assignee was entitled to receive as it arose, was not, as against a particular assignee of the husband, liable to any equity to a settlement on the part of the wife.

PETITION.

Thomas Carr by his will, dated the 5th of December, 1827, gave certain leasehold property, after the death of his wife, to each of his daughters, *Elizabeth Jackson* and *Mary Ann Carr*, for her sole use and benefit, and his residuary estate, after the death of his wife, to his two daughters, *Mary Ann* and *Elizabeth*, to be divided between them in equal moieties, but declared that, in case his said daughters, or either of them, should happen to die in his lifetime, or in the lifetime of his wife, he gave the share and interest to which the daughter so dying would have been entitled under his will to her child or children lawfully begotten, if more than one, share and share alike; and in case the said daughter so dying should not have left any child or children, then in such manner as she should by will bequeath, direct, or appoint; and in default of such bequest, direction, or appointment, to her next of kin.

Thomas Carr died on the 25th of November, 1828, and the daughters became entitled to the specifically-bequeathed leaseholds, but there was no residue.

Elizabeth Jackson died in January, 1848, in the lifetime of her mother, leaving several children.

The testator's widow died on the 19th of February, 1855.

Mary Ann Carr died unmarried on the 29th of May, 1856, having by her will, dated the 22nd of March, 1841, given her inte-

V.-C. M. 1871 *In re* Carr's Trusts.

rest in the leasehold property to which she was entitled under the will of her father to her sister, *Elizabeth Jackson*, for her life, and after her death to the children of the sister who should attain twenty-one, and the issue of such of them as should be then dead leaving issue.

Agnes Victoria Jackson, who was one of the daughters of *Elizabeth Jackson*, and therefore entitled to a share under both wills, in 1858 married *William Humphries*. The income of Mrs. *Humphries'* two shares amounted to £50. *William Humphries* was, in 1859, indebted to the Petitioner, Mr. *Gadsden*, and gave him by way of security a document in the following form, duly signed by both himself and Mrs. *Humphries*:—

"5, *King Street, Holborn*,
"9th December, 1859.

"*David Gadsden*, Esq., 13, *Great St. Helen's*.

"Sir,—We hereby agree to charge, and, as far as possible, we hereby charge, all the share of the undersigned *Agnes Victoria Humphries* in the real and personal property derived from her late mother, *Elizabeth Jackson*, and her late aunt, *Mary Ann Carr*, and the rents and profits thereof, with the repayment to you of £500 (five hundred pounds) advanced to the undersigned *William Humphries*, with interest at 5 per cent. per annum till payment, and we will, when required by you, execute a proper deed for better effecting that purpose.

"Yours faithfully,
"*William Humphries*,
"*Agnes V. Humphries*."

On the same day the Petitioner sent a notice in writing of his charge to the executors of *Mary Ann Carr*, one of whom was *Thomas Carr Jackson*, who was also administrator *de bonis non* of *Thomas Carr*. The following was also sent to the person who was at the time receiver of the rents of the real and leasehold estates of *Thomas Carr*:—

"5, *King Street, Holborn*,
"9th December, 1859.

"Mrs. *Wakefield*, 37, *Milner Square, Islington*.

"Dear Madam,—We authorize and request you henceforth to pay to *David Gadsden*, Esq., or his order, £50 per annum, payable

half-yearly, on or at Midsummer and Christmas, out of the share of the undersigned *Agnes Victoria Humphries* in the rents and profits of leasehold and other property which you receive on behalf of yourself and others.

"Yours very faithfully,
"*W. Humphries,*
"*Agnes V. Humphries.*"

On receiving this notice, Mrs. *Wakefield* paid the income of the shares to the Petitioner till the year 1863, when *William Humphries* became bankrupt.

From that time, though the assignees in bankruptcy authorized the payment of the income to the Petitioner, it was received by *Thomas Carr Jackson*, and was by him accumulated. On the 5th of August, 1870, the accumulations, which, after deducting expenses, amounted to £349 16*s.* 6*d.*, were paid into Court. The sum now due to the Petitioner was £321 18*s.* 6*d.*, and was claimed by him as arrears of the income to which the husband was entitled in right of his wife upon the shares which formed the subject-matter of his security.

No claim was made by the assignees in bankruptcy.

Mr. *Glasse*, Q.C., and Mr. *Willis Bund*, for the Petitioner:—

The whole of the fund in Court represents arrears of income which the husband was entitled to receive in right of his wife, and the wife can have no equity to a settlement: *Tidd* v. *Lister* (1); *Life Association of Scotland* v. *Siddal* (2). The fund here consists of arrears of income, and is not, as in *Stiffe* v. *Everitt* (3), a reversionary fund. But if there had been any equity to a settlement, as against the husband or a general assignee, from him, there is none as against a particular assignee, which is the present case: *Elliott* v. *Cordell* (4); *Stanton* v. *Hall* (5); *Hill* v. *Edmonds* (6).

Mr. *Byrne*, for Mrs. *Humphries*:—

First: The memorandum professes to assign a share derived by Mrs. *Humphries* from her mother, from whom she, in fact,

(1) 3 D. M. & G. 857. 18 Jur. 543
(2) 3 D. F. & J. 271. 7 Jur. N. S. 705
(3) 1 My. & Cr. 37.
(4) 5 Madd. 149.
(5) 2 Russ. & My. 175.
(6) 5 De G. & Sm. 603.

V.-C. M. 1871 *In re* Carr's Trusts.

derived nothing, and, being executory, cannot be made the basis of a claim on the share derived from her grandfather, except upon bill filed.

Secondly: The fund in Court is a *chose in action* of the wife not reduced into possession by the husband. The result of the authorities is, that a wife has an equity to a settlement out of a mere chattel interest in real estate: *Sturgis* v. *Champneys* (1); *Hanson* v. *Keating* (2). Those cases are stronger than the present, but *Freeman* v. *Fairlie* (3) is exactly in point. The cases cited for the Petitioner were cases where the wife was only entitled to a life interest, and that distinction is drawn in *Lewin* on Trusts (4). *Wortham* v. *Pemberton* (5) decides that the equity arises where there is a legal interest in chattels real without the right of possession.

[Mr. *W. Pearson, amicus curiæ*, said that His Honour had, in *In re Potter's Trusts* (6), treated *Wortham* v. *Pemberton* as an exceptional case.]

In re Suggitt's Trusts (7) and *Spirett* v. *Willows* (8) shew the kind of settlement which the Court directs in these cases.

The income has remained in the hands of a third party, and there has been, consequently, no reduction into possession: *Prole* v. *Soady* (9); *Aitchison* v. *Dixon* (10); for the husband has never been in a position to recover the money in an action for money had and received. The income must follow the *corpus*, unless, upon authority, a distinction can be shewn.

Mr. *Glasse*, in reply:—

The distinction between this case and those cited is, that the Petitioner is a particular assignee. *Life Association of Scotland* v. *Siddal* (11) was a case of *corpus*, not income only.

Sir R. Malins, V.C.:—

It is quite settled that where a married woman has an interest in real or leasehold property, the husband has the right to receive

(1) 5 My. & Cr. 97.
(2) 4 Hare, 1.
(3) 11 Jur. 447.
(4) 5th Ed. p. 531.
(5) 1 De G. & Sm. 644.
(6) Law Rep. 8 Eq. 52.
(7) Ibid. 3 Ch. 215.
(8) Ibid. 4 Ch. 407.
(9) Ibid. 3 Ch. 220.
(10) Ibid. 10 Eq. 589.
(11) 3 D. F. & J. 271.

the income. In the present case the wife claims an equity to a settlement out of arrears of past income which has been duly received, but retained and accumulated, and has been now paid into Court.

The case cited by Mr. *Glasse*, *Tidd* v. *Lister* (1), appears to me conclusive of the question; but I think the principle on which the equity to a settlement rests is settled also, which is, that the wife is entitled to intercept payment to her husband by setting up her equity. But it is clear that payment to the husband is good till her adverse claim is established. I assume, for the present purpose, that Mrs. *Humphries* can establish an equity to a settlement of the *corpus* of this fund; but till she sets up that equity the trustees are entitled to pay the money to her husband, and I think he or his assignee ought to be in the same position as if it had been paid to him as it became due.

Therefore I think the question is clear upon principle. But, on authority, I think it is established that a wife cannot have an equity to a settlement out of past income. The right of the husband to receive the income as it became due being clear, it is too late for the wife to intercept it.

Then, as to the argument that the share derived from the grandfather did not pass under the memorandum, it is true that, strictly, Mrs. *Humphries* derives no share from her mother, as expressed in the memorandum; but there is no doubt that it was intended to comprise the property derived by her on the death of her mother.

There might possibly have been some difficulty if the question had turned solely on the construction of the memorandum itself, but all doubt has been removed by the subsequent documents, and the receiver, who has received the income under the authority of the memorandum, has treated it as constituting a charge upon both shares.

Therefore I have no doubt that this memorandum, which was given for valuable consideration—whether for money received before or after it was given makes no difference—was a complete authority to pay the income of the fund to the Petitioner. It was a valid document against the husband, and the money must be paid according to the prayer.

Solicitors: Mr. *J. B. Marsden*; Mr. *W. Sparling*.

(1) 3 D. M. & G. 857. 16 Jur. 543.

V.-C. W.

1871

July 3.

ARMSTRONG *v.* ARMSTRONG.

Costs—Authority of Receiver—Proof in Bankruptcy—Satisfaction of Debt.

A Plaintiff deprived of the conduct of an administration suit, who attended the taking of the accounts in Chambers:—

Held, not entitled to his costs.

In re Taylor's Estate (1) followed.

Where a receiver in the cause, without obtaining leave from the Court, proved against the estate of a bankrupt legatee, who was a debtor to the estate:—

Held, that the receiver must be treated for this purpose as having authority, and that the effect of the proof was to discharge the debt and entitle the bankrupt, whose bankruptcy had been annulled, to his legacy.

MRS. *E. P. JOHNSTON*, by her will, dated the 12th of November, 1864, after giving several legacies, divided her residue into three equal parts, and directed her trustees and executors to pay, assign, and transfer one-third part thereof unto and equally between her nephew *Samuel Walter Rowse*, *Anne Blackmore Rowse*, and *Eleanor Cole Armstrong*. She appointed the Defendant *William Armstrong* and another person, who died in her lifetime, executors. *Anne B. Rowse* having died in her lifetime, the testatrix, by a codicil, gave her third part between *S. W. Rowse* and *E. Cole Armstrong*. The testatrix died on the 25th of July, 1868, and her will was proved by *W. Armstrong*, the surviving executor. A bill was subsequently filed by *E. Cole Armstrong*, the legatee, to administer the estate, and in January, 1870, a decree was made for administration, but, in consequence of the bankruptcy of the surviving executor, on the 13th of April, 1870, subsequent to the decree, the suit was ordered to be carried on against the trustees of the bankrupt. On the 29th of January an order was made appointing one *S. Owen* receiver in the cause. By an order dated the 22nd of February, 1870, the conduct of the cause was taken from the Plaintiff and given to Dr. *Colenso* and other legatees who were Defendants, leave being given, however, to the Plaintiff to attend the proceedings without prejudice to the question whether it should be at her own expense or not. On the 16th of February, 1871, the Chief Clerk made his certificate, whereby he found that, in

(1) Law Rep. 1 Eq. 495.

respect of a debt due from the bankrupt estate of *Armstrong, Rowse, & Co.*, the receiver had proved and received a dividend of 6*s.* 8*d.* in the pound, leaving a balance still due from the bankrupts of £429 12*s.* 11*d.* *Samuel Walter Rowse* had been served with the decree.

It appeared that *Samuel Walter Rowse* and the Defendant *William Armstrong* carried on business in co-partnership, and were indebted to the testatrix at her death on a promissory note for £600, dated the 25th of March, 1865, which, with interest up to the date of the bankruptcy, amounted to £614 17*s.* 1*d.* The receiver, without having applied to the Court for its sanction, proved under the bankruptcy for the debt, and received a dividend of 6*s.* 8*d.* in the pound. The bankruptcy was subsequently annulled by resolution of the creditors.

Mr. *Dickinson*, Q.C., and Mr. *Martineau*, for Dr. *Colenso* and the other Defendants having the conduct of the cause, objected to the Plaintiff being allowed the costs of attending the proceedings after the order giving to the Defendants the conduct of the cause.

[They cited *In re Taylor's Estate* (1).]

Mr. *Greene*, Q.C., and Mr. *Renshawe*, for the Plaintiff, contended that the Plaintiff, being a party to the suit, and interested, was entitled to attend the proceedings, and to the costs of so doing.

Mr. *Bagshawe*, for other parties.

The VICE-CHANCELLOR said these costs could not be allowed. The rule of the Court was laid down very clearly in *In re Taylor*, and he would act up to the rule there laid down, but he would not go beyond it.

Mr. *Dickinson*, Q.C., said the only remaining question was, whether *Samuel Walter Rowse* was entitled to receive his share of the residuary estate until the debt found due by the Chief Clerk's certificate from *Armstrong & Rowse*, viz., £429 12*s.* 11*d.*, was satisfied.

Mr. *W. S. Owen*, for *Samuel W. Rowse*, the legatee whose firm

(1) Law Rep. 1 Eq. 495.

V.-C. W. 1871 ARMSTRONG v. ARMSTRONG.

had become bankrupt, contended that the debt was satisfied. The receiver appointed by the Court proved under the bankruptcy and received a dividend of 6*s.* 8*d.* in the pound, of which the estate had the benefit. The effect of this was to discharge the debt: *Stammers* v. *Elliott* (1); *Bankruptcy Act*, 1869, s. 28.

Mr. *Dickinson* objected that the receiver had acted of his own authority, and without the sanction of the Court.

Mr. *Owen*:—The receiver not only had authority to collect and get in the assets, but it was his duty to do so; and that was all he did. With the legal effect of his act he had nothing to do.

SIR JOHN WICKENS, V.C.:—

I think, upon the whole, that the receiver must for the present purpose be taken to have acted with sufficient authority. Had the bankrupt legatee been a stranger, he would, of course, have been discharged; and the question is, whether it makes a difference that he was a *quasi* party to the suit. I think not. It follows that the authority cited on behalf of the legatee applies, and the legatee must be paid his share of residue, notwithstanding the finding in the certificate.

Solicitors for the Plaintiff and for *S. W. Rowse*: Messrs. *Walters & Gush.*

Solicitors for Dr. *Colenso* and other Defendants: Messrs. *Walker & Martineau.*

Solicitor for other Parties: Mr. *J. Elliott Fox.*

(1) Law Rep. 3 Ch. 195.

DOUGLAS *v.* DOUGLAS.
DOUGLAS *v.* WEBSTER.

V.-C. W.
1871
May 24, 25, 29, 30, 31; *June* 3, 5, 7; *July* 17.

[1871 D. 110. D. 138.]

Election—Pleading—Suit to ascertain Value with a view to elect—Domicil.

Consideration of the circumstances under which a person, who is put to election, may file a bill to have the value of the property, subject to the election, ascertained. Discussion of *Butricke* v. *Broadhurst* (1) and of Mr. *Swanston's* note in *Dillon* v. *Parker* (2).

Robert, son of a domiciled Scotchman, who, in 1792, at the age of eighteen, entered the Home Office (*London*), where he remained till 1802, when he resigned his office, having married an English lady of fortune, and after residing for some time in several hired houses in *England*, finally settled and died in his family mansion house in *Scotland*, which, with part of the family estate, he had purchased with his wife's money from his father's trustees:—

Held, that he had not lost his domicil of origin.

The testator, son of *Robert*, was born in 1803, during a visit his parents made to *London*, and from the age of thirteen resided with his parents in *Scotland*, paying occasional visits to *England*, till his mother's death in 1857, after which he let for short terms his family estate, and making occasional visits to *Scotland*, resided chiefly in hired houses in *England*, where he cohabited with an Englishwoman whom, after the birth of his first child, he married, and for whom, by an English will, he made a provision, including a residence in *England* to be used after his decease; and having in the Scotch form disponed of his Scotch real estate to his nephew, died in *England*, where he was buried in a grave he had purchased for the interment of his step-brother:—

Held, that his domicil was Scotch.

The intention required to effect a change of domicil (as distinguished from the acts embodying it) is an intention to settle in a new country as a permanent home, and this is sufficient without any intention to change civil status, and, *semble*, even though an intention to retain the old civil status be proved.

Donaldson v. *M'Clure* (3), *Moorhouse* v. *Lord* (4), *Attorney-General* v. *Countess de Wahlstatt* (5), *Udny* v. *Udny* (6), *Haldane* v. *Eckford* (7), *Aitchison* v. *Dixon* (8), discussed.

WILLIAM DOUGLAS, a domiciled Scotchman, the grandfather of the testator, on the 28th of November, 1767, on his marriage with *Elizabeth Graham*, settled his hereditary estate of *Brigton*, *Forfarshire*, on himself and his heirs male, with a provision for

(1) 1 Ves. 171.
(2) 1 Sw. 381, n.
(3) 20 Court of Sess. Cas. (2nd Series) 307.
(4) 10 H. L. C. 272.
(5) 3 H. & C. 374
(6) Law Rep. 1 H. L., Sc. 441.
(7) Ibid. 8 Eq. 631.
(8) Ibid. 10 Eq. 589.

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

younger children. *William Douglas* was also proprietor of other family estates, situated at *Glammis* and *Broughty Ferry*, in *Scotland*. On the 12th of April, 1773, his eldest son, *Robert Douglas*, was born at *Dundee*, and was brought up in *Scotland* till 1790, when he was sent to *France* to be educated, in order to qualify him for an office under the British Government. In 1792 *Robert* returned to *England*, and shortly afterwards was appointed to a clerkship in the Home Office, which office he held till 1802. During this time he lodged in *Pall Mall*, but spent a great deal of his spare time at *Clapham*, at the house of an intimate friend named *Webster*. About the year 1800 Mr. *Webster* died, and his widow after his death rented a house called *Langham House, Suffolk*. In June, 1802, *Robert Douglas*, who was then lodging in *London*, was married to Mrs. *Webster*, who had considerable means, in the parish church of *Langham, Suffolk*. In November of the same year he resigned his clerkship in the Home Office, which was worth then about £300 a year.

In the entry in the parish book, *Robert Douglas* was described as of the parish of *St George, Hanover Square, London*. From the time of his marriage *Robert Douglas* maintained himself on his wife's property, and resided till 1814 at *Aldborough, Suffolk, Newby Wiske, Yorkshire*, and other places in *England*, where he engaged houses for short terms, paying occasional visits to *Scotland*.

On the 4th of August, 1803, *William Douglas*, the eldest son of *Robert Douglas*, was born in *London*, while his parents were on a visit, and during their occupancy of *Langham House*.

In 1804 *William Douglas*, the grandfather, executed a trust deed of *Brigton* in favour of creditors, with a power of sale, but continued to reside there till 1810, when he removed to *Broughty Ferry*, where he died in 1814.

In 1811 the *Brigton* estate was sold in lots, and the mansion house and grounds, with part of the land surrounding it, were purchased by *Robert Douglas*, principally with money borrowed from his wife's trustees. The remainder of the estate was sold to Lord *Strathmore*.

In a letter written to his father by *Robert Douglas*, and dated the 8th of October, 1811, occurs the following passage:—"In consequence of my wife's determination of having a home of her

own, she delayed writing until it could be ascertained what you could do for me to enable us to make *Brigton* that home; and upon receipt of your letter of the 22nd of November, containing your promise to assist me, she wrote to her trustees."

Shortly after his father's death, in 1814, *Robert Douglas* refurnished *Brigton*, and resided there, with his wife and son, till his death on the 8th of August, 1835.

The furniture in the house at the time of his death belonged to Mrs. *Douglas*.

William Douglas, the testator, at his father's death was thirty-two years of age. From 1815 or 1816 he had always resided with his father and mother at *Brigton* as his home, which, after the sale in 1811, consisted of the mansion-house and grounds and the home farm. After *Robert Douglas's* death Mrs. *Douglas* lived with her son at *Brigton*, defraying all the household expenses, and her son, the testator, managed the farm, which was kept in hand and was his own property. In June, 1846, Mrs. *Douglas* bought a house at *Broughty Ferry* called *Carbat House*, distant about twelve miles from *Brigton*, which she occupied as a winter residence, and *Brigton* as a summer residence, till her death on the 9th of September, 1857. Between the death of his father and mother the testator occasionally paid short visits to *England*. During these visits he became acquainted with a Mrs. *Rigge*, the widow of a perfumer, who, with her two daughters, who were milliners, lived in *New Bond Street*. On the 30th of September, 1857, he wrote to the eldest daughter, announcing his intention of shortly visiting *London*, which he soon afterwards fulfilled.

The principal events in connection with the testator's acts and residence from his mother's death were as follows:—

1857. Sept.	9.	Mrs. *Douglas* died.
Dec.	.	Testator came to *London* and took lodgings in *St. James's Place, London*.
1858. Jan.	19.	Opened an account with the *Royal Bank of Scotland* in *Dundee*.
Mar.	.	Returned to *Scotland* for a short visit. Ordered sale of his mother's house at *Broughty Ferry*.
Apr.	.	Visited *Bridge of Allan*, and then returned to *London*.

V.-C. W.
1871
DOUGLAS v. DOUGLAS.
DOUGLAS v. WEBSTER.

May to July. Resident at *Brigton;* which he described as "dismally dull."

Aug. . Went to *England.* Wrote from *Dover* to his housekeeper at *Brigton,* directing letters to be sent to 42, *New Bond Street,* where he would get them on his way through.

Sept. and Oct. Resident at *Brigton.*

Nov. . Returned to *St. James's Place,* and on the 20th of November removed to 42, *New Bond Street.*

1859. Mar. . Gave directions for painting and repairing *Brigton.*

Apr. . Again in *St. James's Place.* Opened an account at *Coutts's,* and gave *Brigton* as his address, which he afterwards changed to *Marlborough Terrace* and *Sommers Cottage.*

1860. Feb. . Testator at *Brigton;* hired a fishing-boat, and remained in *Scotland.* Chiefly at *Brigton* till September, and in October he let the home farm at *Brigton* to a Mr. *Guthrie.*

1860. Oct. . Returned to *England,* and rented a house, No. 3, *Marlborough Terrace, Old Kent Road,* to which, shortly afterwards, he removed and lived with the Plaintiff, *Ellen Douglas,* as his wife, till he removed to *Sommers Cottage, Brixton.*

1860. . During this year *Brigton* was managed chiefly by *P. Webster,* who had been appointed factor soon after Mrs. *Douglas'* death.

Nov. 26. Refused to let *Brigton,* as it would throw him out of a home altogether.

1861. May to July. Testator during part of this time at *Brigton,* which he spoke of as his home.

July 26. Negotiated with landlord of *Sommers Cottage, Brixton Hill,* near *London,* for purchase.

Aug. . Testator at *Brigton,* afterwards at *Bridge of Allan;* stated he "would not let *Brigton.*"

Sept. . Removed to *Sommers Cottage,* of which he had taken a lease for three or seven years.

1862. Mar., May, and July. Testator paid short visits to *Brigton.*

June 18. Eldest son born at *Sommer's Cottage;* in register

father described as independent gentleman, of *Sommers Cottage, Brixton Hill.*

July . Trust disposition of property in *Scotland* in favour of nephew, Defendant Colonel *Douglas*, prepared.

Sept. . Testator "thinks of letting *Brigton.*"

Nov. 6. Plate-chest sent to *Forfar Bank* with a view of letting *Brigton.*

1863. Jan. . *Brigton* advertised to be let.

Feb. . Let *Brigton* to a Mr. *Millar;* but refused to grant more than two years, though a longer term had been in contemplation; and reserved two rooms and a room above the granary.

Apr. . Testator at *Brigton;* stored away furniture and discharged his servants.

Aug. . *Millar* applied for extension of lease, but was refused.

Aug. 13. Testator married *Ellen Rigge* at *Folkestone.*

Aug. 19. Made will purporting to dispose of his real property in *Scotland* in favour of Colonel *Douglas.*

Dec. . Purchased a grave at *Camberwell Cemetery* for the interment of his step-brother.

1864. Jan. 25. Made another will disposing of *Brigton.*

Aug. . Gave up pew at *Brigton* as "not a residenter."

Nov. . Testator made another will, disposing of *Brigton.*

1865. Jan. 5. Testator's second child born.

July . Testator agreed to extend *Millar's* lease for two years.

Contemplated purchase of a freehold estate at *Harrow.*

Aug. . Testator at *Broughty Ferry.*

Sept. 26. Execution of new lease of *Brigton,* reserving bow-room and bed rooms.

Dec. . Purchased long leasehold house at *Putney,* describing himself as of *Sommers Cottage.*

Plate sent up from *Scotland* by Mr. *Webster.*

1866. May . Made an investment in the funds, and described himself of *Sommers Cottage.*

V.-C. W.
1871
DOUGLAS v. DOUGLAS.
DOUGLAS v. WEBSTER.

June 14. Third child born at *Sommers Cottage*.

Aug. . Took a pew at *Brixton Church*.

1867. May 25. Testator made another will in the English form, purporting to dispose of *Brigton* in favour of Colonel *Douglas*.

Aug. 30. Testator describes himself as a "residenter" in *England*.

Sept. . Testator, after again contemplating the purchase of a freehold, abandoned the idea, and took a lease of *Heathfield, Streatham* for 5¾ years, and removed there.

Sept. . Testator closed his account with the *Dundee Bank*, which he had opened in 1858.

Sept. . Testator made a trust disposition of *Brigton* in favour of Colonel *Douglas*.

1868. June 25. Final lease of *Brigton* to Mr. *Millar* for three years. Testator gave up the rooms he had reserved there, and removed his furniture and pictures to *Heathfield*.

Dec. 21. Last will, in English form, substantially identical with two previous wills in the same year, being to the effect hereinafter stated.

1869. Feb. 16. Died at *Heathfield*.

By his will in the English form, dated the 21st of December, 1868, after revoking all other wills, he gave to his widow his plate and household effects, and his balance in his bankers' hands. He gave to his nephew, Colonel *Douglas* and *Patrick Webster*, whom he appointed his executors, his leasehold house at *Putney* on trust, to allow his widow to reside in it, and after her death to retain it as a residence for his children till the youngest should attain twenty-one, or to sell it and to hold the proceeds on the same trust as a legacy of £10,000, thereinafter given, with a proviso that it might be sold, with the widow's consent, in her lifetime, in which case she was to receive the income of the proceeds during her lifetime, and the capital was to go in the same way as the £10,000. He directed his executors to set apart 3 per cent. stock, the equivalent of £7200, and to pay the income to the widow for life, after which it was to go as the £10,000. He bequeathed to his

executors £10,000 sterling in trust for and to be equally divided among his children who should attain twenty-one, with the usual provisions for maintenance, advancement, and accumulation, with a proviso that if no child of the testator attained twenty-one the capital should fall into the residue of his estate. The testator declared that the provisions made by his will for his wife should be taken by her in lieu of all dower and thirds, and all other rights and interests at common law or otherwise, to which she might be entitled out or in respect of any estate or estates which he might die seised or possessed of or entitled to in *Scotland* or elsewhere; and he left, bequeathed, gave, granted, assigned, and disponed to Colonel *Douglas* all the residue of his goods, gear, debts, and sums of money, and in general the whole of the residue of his moveable means, estate, and effects whatsoever that might pertain to, be vesting in, or owing to him at the time of his decease. But always with and under the burden of all his just debts, death-bed, and funeral charges, and legacies, and gifts, thereinbefore by him given. And he thereby gave, granted, assigned, and disponed to and in favour of Colonel *Douglas*, his heirs, executors and assignees, all and singular the lands and heritages, and in general the whole heritable and real estate and effects, of what kind or denomination soever and wheresoever situated, then belonging to him or that should belong to him at the time of his decease.

The executors duly proved the will, and paid to the widow certain inconsiderable sums in pursuance of the trusts of the will. She subsequently, by her solicitors, served notice that she did not accept such payments by way of election to take the benefits given her by the will. On the 9th of September, 1869, she filed this bill against the trustees and her own children, alleging that the real estate in *Scotland* did not pass by the will, but had devolved on Defendant, *William Charles Douglas*, and praying, 1, that the trusts of the will of the testator might be carried into execution under the direction of the Court; 2, that for the above purpose all necessary accounts might be taken, directions given, and inquiries made, including an inquiry as to the testator's domicil, and an inquiry of what real and heritable estate he died seised or possessed of, either in *Scotland* or elsewhere, and what was the value of his real and heritable estate and moveable property at his death; 3, that

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

all questions of collation and election proper to be determined with reference to his property might be determined in this suit; 4, for further relief.

The case made by the Plaintiff was stated in the tenth paragraph of the bill, as follows:—

"The Plaintiff is advised, that notwithstanding the provision made for her by the will, she is entitled to insist on her legal rights in the testator's property, and to claim one-third part of his moveable estate wheresoever situate, and also her terce in his heritable estate in *Scotland*. The Plaintiff is also advised that in case it shall not be for the benefit of the Defendant, *William Charles Douglas*, to collate or bring into hotchpot the heritable estate in *Scotland*, which has devolved upon him as such heir-at-law of the testator, the Defendants, *Robert* and *Mary Douglas* (his brother and sister), will be entitled to insist on the exclusive right by way of *legitim* to one-third of the testator's moveable estate, wheresoever situate, in lieu of the provisions made for them by the will, and that if the said *William Charles Douglas* shall so collate the said heritable estates, such heritable estate and *legitim* will be divisible between him and his brother and sister in equal shares."

On the 11th of November, 1869, Colonel *Douglas* filed a cross bill against the widow and her children, praying, 1, that it might be declared that the testator at the times of making his will and of his death was domiciled in *England*, and that his personal estate wherever situate became disposable by the law of *England*, and that the same had been effectually disposed of by the will of the 21st of December, 1868; 2, that the Plaintiff (in cross bill) was entitled to the personal estate not specifically bequeathed, subject to the payment of debts, funeral expenses, legacy duty and legacies; 3, that all necessary accounts might be taken and directions given.

Sir *Roundell Palmer*, Q.C., Mr. *Anderson*, Q.C., and Mr. *Cookson*, for the Plaintiff, *Ellen Douglas*.

Mr. *Greene*, Q.C., and Mr. *Higgins*, for the Defendant the eldest son of the Plaintiff:—

The question to be decided is one partly of fact and partly of

legal presumption arising from facts. There is in this case no declaration of intention either way, and no evidence of intention beyond what may be collected from the testator's acts.

The first point to be considered is the domicil of origin; because if it can be shewn that before he took up his abode in *England* the testator's domicil of origin was Scotch, the burden of proof that he changed it lies on the Defendant Colonel *Douglas*. It is also important for the Plaintiff to establish a Scotch domicil of origin if she can, because the tenacity of a domicil of origin is greater than one which has been acquired: *Lord* v. *Colvin* (1); *Moorhouse* v. *Lord* (2); *Whicker* v. *Hume* (3); *Munro* v. *Munro* (4); *In re Capdevielle* (5); *Aikman* v. *Aikman* (6); *Donaldson* v. *M'Clure* (7). Some criticism had been made on the language of Lord *Kingsdown* in *Moorhouse* v. *Lord*, but it extended only to the expressions used and not to the meaning.

It is the common case of both parties that a man can have but one domicil: *Somerville* v. *Somerville* (8); and that the parents of an infant have power to change his domicil by changing their own: *Johnstone* v. *Beattie* (9).

[The VICE-CHANCELLOR:—It seems doubtful whether a guardian can change an infant's domicil. The difficulty is that a person may be guardian in one place and not in another.]

The domicil of origin of the testator was that of his father *Robert Douglas*: *Patris originem unusquisque sequitur*: Cod. b. x. t. 32, l. 36. Now the domicil of origin of *Robert* was unquestionably Scotch. The Defendant Colonel *Douglas* is therefore bound to shew that *Robert Douglas*, by accepting and holding a clerkship in the Home Office, from 1792 to 1802, and by his partial residence in *England* during that period, changed his Scotch domicil to an English one. But it is well settled that the servants of the Crown do not by their change of residence, necessitated by the duties of their office, thus change the domicil: *Attorney-*

(1) 4 Drew. 366, 422. 5 Jur NS 857.
(2) 10 H. L. C. 272, 286, 288—291. 9 Jur NS. 677.
(3) 7 Ibid. 124. 4 Jur NS 933.
(4) 7 Cl. & F. 842.
(5) 2 H. & C. 985. 10 Jur NS. 1155.
(6) 3 Macq. 854. 7 Jur NS 1017
(7) 20 Court of Sess. Cas. (2nd Series) 307.
(8) 5 Ves. 750.
(9) 10 Cl. & F. 42, 133.

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

General v. *Napier* (1); *Warrender* v. *Warrender* (2); *Brown* v. *Smith* (3); *Udny* v. *Udny* (4). Even assuming *Robert Douglas* to have gone to *England*, not to hold an office under the Crown, but to gain a livelihood, his domicil of origin would have remained unchanged: *Jopp* v. *Wood* (5).

But suppose the testator's domicil of origin to be English; he was taken to *Scotland* by his parents at an early period, was brought up and educated by his parents in *Scotland* on his father's hereditary property, and thereby acquired for himself a Scotch domicil, which he retained till his mother's death in 1857: *Arnott* v. *Groom* (6); *Scrimshire* v. *Scrimshire* (7).

Then what was the effect on his domicil, whether of origin or acquired, which was produced by his residence in *England* from 1857 to 1869. Nothing occurred during that period to warrant a presumption that he intended to change his domicil, or, upon the principle laid down in the authorities, to work a change. Suppose it were proved that his intention was to remain in *England* during his wife's life, that would not be sufficient to work a change in his domicil, whether of origin or acquisition: *Donaldson* v. *M'Clure* (8).

Having a house and establishment in one country is perfectly consistent with a domicil elsewhere: *Munro* v. *Munro* (9); *Bell* v. *Kennedy* (10); *In re Capdevielle* (11); *Udny* v. *Udny*; *Aikman* v. *Aikman* (12); *Moorhouse* v. *Lord* (13); *Somerville* v. *Somerville* (14).

The Defendants rely on certain expressions of the testator, such as these: "I am a residenter in *England*," and, "I find *Brigton* dismally dull;" but mere expressions at different times of preference of one country over another, even if these amounted to so much, are not sufficient to effect a change of domicil: *Moorhouse* v. *Lord* (15); *Forbes* v. *Forbes* (16). Even the purchase of a place

(1) 6 Ex. 217.
(2) 2 Cl. & F. 488, 528–9.
(3) 21 L. J. (Ch.) 356.
(4) Law Rep. 1 H. L., Sc. 441.
(5) 28 Beav. 53; S. C. on motion for rehearing, 3 N. R. 404.
(6) 9 Court of Sess. Cas. (2nd Series) 142.
(7) 2 Hagg. Consist. 395–405.
(8) 6 Jur. (N.S.) 407; S. C. 20 Court of Sess. Cas. (2nd Series) 307.
(9) 7 Cl. & F. 842, 880.
(10) Law Rep. 1 H. L., Sc. 307.
(11) 2 H. & C. 985. 19 Jur N.S. 1155
(12) 3 Macq. 854. 7 Jur N.S. 1017
(13) 10 H. L. C. 272. 9 Jur N.S. 767
(14) 5 Ves. 750, 764.
(15) 10 H. L. C. 272, 288. 9 Jur N.S. 6
(16) Kay, 341, 364. 18 Jur 842

(5) S.C. 6 Jur N.S. 620.

of residence in *England* would not of itself be conclusive: *Hodgson* v. *De Beauchesne* (1).

There being no declaration of intention by the testator, the Court must look at his acts and conduct, and the fair inference from these is that, though for obvious reasons he remained absent from *Scotland* for a time, his purpose was, so soon as his friends should become reconciled to his marriage, to return to *Brigton*. It is impossible in this case to find any point of time when the testator can be said to have determined to fix his home in *England;* and without that evidence, direct or implied, mere residence is immaterial. So far from there being that evidence here the weight of the evidence is the other way. Down to the last the testator held public offices in *Scotland*. His last cheque was signed "*William Douglas*, of *Brigton*." The envelope containing his will was endorsed "*William Douglas* of *Brigton*." His persistent refusal to let *Brigton* except for short terms can only be accounted for by the hypothesis, corroborated by his whole conduct, that he intended, probably at no fixed period, but when opportunity offered, to settle finally in *Scotland* on his paternal inheritance.

Having regard to the whole case the declaration of the Court ought to be that the testator at the date of the birth of his eldest son, of his will, and of his death, was domiciled in *Scotland*.

[They also cited *Birtwhistle* v. *Vardill* (2); *Crookenden* v. *Fuller* (3); *Potinger* v. *Wightman* (4); *In the Goods of Donaldson* (5); *Vattel* by *Chitty* (6); *Scott* v. *Bentley* (7).

On the question, whether the will would pass real estate in *Scotland*, the following authorities were referred to: *Maclaren* on Wills (8); *Bell's* Principles (9); *Purvis* v. *Purvis* (10); Statutes 19 & 20 Vict. c. 89, 31 & 32 Vict. c. 101, s. 20; *White* v. *Finlay* (11); *Leslie* v. *Macleod* (12); *Howden* v. *Crighton* (13).]

(1) 12 Moo. P. C. 285.
(2) 7 Cl. & F. 895.
(3) 1 Sw. & Tr. 441.
(4) 3 Mer. 67.
(5) 2 Curt. 386.
(6) Page 100.
(7) 1 K. & J. 281.
(8) Vol. i. p. 42, s. 79.
(9) Fol. 1637.
(10) 23 Court of Sess. Cas. (2nd Series) 812.
(11) 24 Ibid. 38.
(12) Law Rep. 2 H. L., Sc. 44.
(13) 1 Court of Sess. Cas. (1st Series) 18.

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

Mr. *Joshua Williams*, Q.C., and Mr. *Thrupp*, for the Defendants the younger children of the Plaintiff, left the question of domicil to the Court.

Mr. *Marten* appeared for the trustee *Webster*, a Defendant in the original and cross suits, but took no part in the argument.

Mr. *Dickinson*, Q.C., and Mr. *Jackson*, for the Defendant, Colonel *Douglas*:—

The suit is improperly framed, and in this form cannot be maintained. The Plaintiff is a specific legatee, and can only maintain a suit for general administration, on an allegation that the funds are in peril, which she nowhere avers.

The Plaintiff, however, asks general administration, no foundation being laid for it: "that all questions of election and collation may be determined" in which she has no interest. The bill alleges that she is entitled to her terce of real and third of personal estate, both in *Scotland*, under her widow's title of *jus relicti*; but the will which she seeks to have administered declares that the provision made for her thereby shall be in lieu of all dower or thirds. This is not a question of election, therefore, so far as the Plaintiff is concerned, but of conditional gift.

If so, the Plaintiff can have no interest in any question of domicil, and cannot maintain a suit to have it determined; neither can she file a bill to have determined any question of election. She does not claim under a testamentary disposition an estate which was not the property of the testator, nor does she seek by this bill to make the person, whose estate the testator has affected to dispose of, make an election. She claims by Scotch law her terce of the testator's real estate, what in *England* would be called the legal estate in her terce. Even if the land were in *England*, she could not maintain a suit for this purpose, except for the peculiar jurisdiction exercised by this Court in cases of dower and partition.

[The VICE-CHANCELLOR:—In *Penn* v. *Lord Baltimore* (1) the real estate of which partition was sought was in *America*.]

But relief was sought there under the peculiar jurisdiction as to partition.

(1) 1 Ves. Sen. 445; 2 Wh. & T. L. C. 1st Ed. p. 664.

It has been argued that the Plaintiff may file a bill to have the value of the property ascertained, with a view to her election; but even if such a suit could be maintained, that is not the object sought here, which only contemplates the collation and election between the infants. The Plaintiff has no interest in such election. There is nothing she can bring into hotchpot. It has been argued, also, that this Court will assist a person not having a legal title to ascertain the condition of the property with a view to electing; but even if this be so, it can only be on a bill specifically framed for this purpose, which this bill is not. But is that the law? Mr. *Swanston*, in his note in *Dillon* v. *Parker* (1), discusses the question, and from his view it would seem that the person to elect is not the person to file the bill.

[The VICE-CHANCELLOR:—Mr. *Swanston* shews that election is as much a legal doctrine as a doctrine of this Court; but that it is this Court which fixes the time for electing.]

Brodie v. *Barry* (2) is the case relied on in support of a Plaintiff's right to file a bill, in order to enable him to elect; but it is no authority at all. The bill was filed in that case by nephews and nieces of the deceased, to compel the heiress-at-law to elect. The converse proposition does not follow, nor is there any clear decision in support of such doctrine.

[The VICE-CHANCELLOR:—It is a point of general importance. *Butricke* v. *Broadhurst* (3) seems to apply.]

The marginal note in that case is, that a party having a right to elect may file a bill to have the property cleared in order to elect to advantage.

That proposition is too general. In *Butricke* v. *Broadhurst* the Plaintiff was the person to make the election, but the bill was not filed for that purpose, but to have the benefit of the estate. The question of election was raised against him, whether after what had happened he must not be held to have elected. That case, therefore, does not help the Plaintiff here.

The next point is as to the sufficiency of the will to pass real

(1) 1 Sw. 381, n. (2) 2 V. & B. 127, 130.
(3) 3 Bro. C. C. 88; 1 Ves. 171.

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

estate in *Scotland;* but it is not properly raised by the bill, and need not be argued on this occasion.

The main question is as to the testator's domicil, and it has been contended that the objection as to entertaining this question on the Plaintiff's bill is cured by the cross bill; but it is not necessary to ascertain the question of the testator's domicil at the date of the birth of the first child, to make such decree as is sought by the cross bill. The question, however, being before the Court, the Defendant does not shrink from the argument.

It has been argued that the place of birth and place of death do not affect the question. This may be true as to place of birth, but is not true as to the place of death, because without evidence to rebut the inference, the place of death is the place of domicil, and the *onus probandi* lies on those who would fix it elsewhere: *Williams* on Executors (1).

The definition of domicil is difficult, and has often been attempted without success: perhaps the best is that given by Sir *Robert Phillimore* in his treatise on Domicil (2), in which he discusses an American decision—*Guier* v. *O'Donnel* (3). These passages are applicable to the case of domicil both of the testator and his father *Robert Douglas*. A brief examination of the authorities will, in connection with the evidence here, shew that the domicils of the father and the testator were both English. The first case to be considered is *Bempde* v. *Johnstone* (4), and as to that the first observation that occurs is that the marginal note is too general to be of much value. On referring, however, to the Lord Chancellor's judgment, which states the facts on which it proceeds, he considers that domicil is more a question of fact than of law, and in examining the facts he lays less stress on the place of birth than on the place of residence, "and where the links were to be found which attached the testator to society, such as wife and children." Applying that principle to the present case, all the evidence indicated *England* as the domicil of the testator.

Then take the case of *Forbes* v. *Forbes* (5) which was cursorily

(1) Page 1199, 3rd Ed.; p. 1403, 6th Ed.

(2) Paragraph of the smaller work, 180.

(3) Paragraphs 198, 226, 256, 258, 264, 269.

(4) 3 Ves. 198.

(5) Kay, 341. 18 Jur 643,

mentioned on the other side. That case was determined on a number of what have been called equivocal circumstances, among which were the marriage and necessary establishment of the testator. It is common ground between the Plaintiffs and Defendant that there can only be one domicil, and that an infant cannot change his domicil.

In the result, the Court gave effect to the English domicil, and deprived the Scotch wife (the true wife) of a considerable part of the property.

Then comes the case of *Udny* v. *Udny* (1), which has been much relied on by the other side, as shewing that before a new domicil can be acquired there must be some act to relinquish the old one; but that case is really an authority in our favour. When the testator came to *England* he gradually loosened and finally dissolved the ties that connected him with *Scotland*, and by his marriage and the establishment he set up for his wife and family, and the provisions he made for his widow's residence in this country, shewed in the clearest way his intention of settling in *England*. It is not necessary, on the authority of *Udny* v. *Udny*, for him to abandon his character as a Scotch proprietor; because, as Lord *Westbury* pointed out in that case, political *status* and domicil are two distinct things.

Then follows the very important case of *Haldane* v. *Eckford* (2); important both because the facts were very similar to the facts here, and also as explaining and putting on a proper footing the decision in *Moorhouse* v. *Lord* (3), where certain loose expressions occasioned some misconception as to the state of law, and which also ran through the decisions in two other cases, *In re Capdeville* (4) and *Attorney-General* v. *Countess de Wahlstatt* (5).

In *Haldane* v. *Eckford*, which bears here a great resemblance to this, particularly as to the preparation of a will which in *Jersey* would be valid but invalid in *England*, the Vice-Chancellor said the rule laid down in *Udny* v. *Udny* must be considered as differing from that laid down in *In re Capdeville* and *Attorney-General* v. *Countess de Wahlstatt*, following *Moorhouse* v. *Lord*, where occurred

(1) Law Rep. 1 H. L., Sc. 441.
(2) Ibid. 8 Eq. 631.
(3) 10 H. L. C. 272.
(4) 2 H. & C. 935.
(5) 3 H. & C. 374.

9 Jur. N. S. 677.
10 Jur. N. S. 1155.

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

the unfortunate expression of *exuere patriam*. The case of *Haldane* v. *Eckford* (1), in which the decision established the *Jersey* domicil, is a clear authority in the defendant's favour. *Aitchison* v. *Dixon* (2), also a decision of the same Judge, is important, as shewing the weight to be attributed, in determining a man's domicil, to the circumstance of his having an establishment for his wife and family in a particular place. The Vice-Chancellor, in his judgment, said that the circumstances brought the case within the principle of *Forbes* v. *Forbes* (3), and made it even stronger. Upon these authorities the fair conclusion must be, that both *Robert* the father and the testator had an English domicil.

The testator's mother was an Englishwoman, and her property in the English funds greatly exceeded the value of the testator's ancestral property in *Scotland*. From his mother's death in 1857 he gradually weakened the ties that bound him to *Scotland*, and at length, by his marriage and the birth of his children, and his establishment in *England*, his abandonment of the rooms he held at *Brigton*, and his disposition of the hereditary property in favour of his nephew, he severed them altogether. Of the eleven things which Sir *Robert Phillimore* (4) puts as tests, where they exist in this case, most are in favour of a Scotch domicil. The first, birth or origin, may be arguable, but the weight of the evidence is in favour of an English birth and origin. The next, oral or written declarations, there are none in this case. He signed himself "*Douglas* of *Brigton*," but that might be by way of distinction from other *Douglases*. The next mentioned by *Phillimore*, the place of death, is of course English. The next, the residence of his wife and family, is also English, and in this respect this case is stronger than *Forbes* v. *Forbes* and *Aitchison* v. *Dixon*, because the desire of the wife, which was referred to as an important element in the latter case, is here acquiesced in, if not originated by, the husband. The next point, trade or pursuit, does not enter into this case. The next, the depositing of documents and papers, hardly applies here, because the papers relating to the Scotch property were in *Scotland*, and those relating to the English property were in *England*. The importance which attaches in some of the

(1) Law Rep. 8 Eq. 631.
(2) Ibid. 10 Eq. 589.
(3) Kay, 341.
(4) Page 100.

cases to the site of the family mansion is here removed, because it was let to a tenant, and the residence of the testator was elsewhere. The next article is, descriptive or legal documents; but here again, where the testator was dealing with Scotch property, being in *Scotland,* he described himself as Scotch, but when with English property, here in *England,* he described himself as English; and where in his will he is dealing with both English and Scotch property he described himself as of both. Then follows possession and exercise of political rights; but this testator, though appointed a Commissioner of Supply and of Roads, never appears to have acted in these capacities; he aided in endowing a church, it is true, but he simultaneously wrote to give up his pew on the ground that he was no longer a "residenter." The next point, the possession of real estate, has already been noticed. The last point enumerated by *Phillimore,* length of residence and lapse of time, is always important: the testator, in this case, left *Brigton* in 1863, and except that he made occasional visits to *Scotland* for short periods, remained in *England* till his death. In some of the cases the period of time was ten, fifteen, and even twenty years; but, though in this case the lapse of time is not great, yet coupled with the family connection, the establishment in *England,* and the complete settlement in *England,* it is sufficient to shew that the *animus* went with the *factum,* and proves an English domicil. There is another circumstance, the purchase of a grave, which, though not conclusive of itself, according to *Hodgson* v. *De Beauchesne* (1) must and will have great weight in determining this case.

With reference to the cases cited on the other side it may be enough to point out that the Plaintiff's case is mainly based on *dicta* in *Moorhouse* v. *Lord* (2), which are practically overruled by *Udny* v. *Udny* (3).

Upon the facts proved in the case and on the principles laid down in the authorities, an English domicil is established.

Story's Conflict of Laws (4); *Pusey* v. *Desbouverie* (5); *Hoskins* v. *Mathews* (6); and *Thomson* v. *Advocate-General* (7), were also cited.

(1) 12 Moo. P. C. 285.
(2) 10 H. L. C. 272.
(3) Law Rep. 1 H. L., Sc. 441.
(4) Sections 41, 46.
(5) 3 P. Wms. 315.
(6) 8 D. M. & G. 13.
(7) 12 Cl. & F. 1.

2 Jur. N.S. 196

V.-C. W. 1871 DOUGLAS v. DOUGLAS. DOUGLAS v. WEBSTER.

Sir *Roundell Palmer*, in reply:—

Two points have been made in opposition to the Plaintiff's claim: first as to the frame of the suit, and secondly as to the testator's domicil. It has been contended, too, that the Plaintiff has already elected; but that proposition is wholly unsustainable, as election can only be established upon evidence that the person whose acts are said to be an election possessed full knowledge of the subject matter: *Streatfield* v. *Streatfield* (1), and the cases there cited.

Even admitting that the rule is too broadly laid down in *Dillon* v. *Parker* (2) it is impossible to dispute the jurisdiction of the Court to assist the Plaintiff as against the residuary legatee, who has filed a cross bill to have the domicil determined, on which depends the Plaintiff's right of election.

Then arises the question of domicil, both of *Robert* the father and the testator.

As to the father, it is now well settled that to hold an office under the Crown requiring absence from the holder's native country does not change his domicil. There is no analogy between cases like the present and the decisions as to Anglo-Indian domicil. Nor would those decisions be followed now. It used to be held that an Englishman who entered into the covenanted service of the *East India Company* had bound himself for life; but a case of that kind is peculiar and has no application to others. It is well settled that residence in another country does not change a man's domicil where it is in the consular service: *Sharpe* v. *Crispin* (3); or in the military service: *Hodgson* v. *De Beauchesne* (4); or in the judicial service: *Attorney-General* v. *Rowe* (5). The Defendants rely on the passages cited from *Phillimore* on Domicil; but it is quite clear that the learned author changed his mind.

There is in this case no declaration of intention; but all the probabilities are that the testator did not intend to change his domicil, which he knew must have the effect of bastardizing his eldest son. If this result, which must have been known to the testator as a Scotchman, be compared with the evidence on which

(1) 1 Sw. 447; 1 Wh. & T. L. C. 1st Ed. p. 248; 3rd Ed. 303.
(2) 1 Sw. 381, n.
(3) Law Rep. 1 P. & D. 611.
(4) 12 Moo. P. C. 285.
(5) 1 H. & C. 31.

the Defendant relies, that he let for a short term his Scotch mansion and took a lease of a small house in *England* quite inadequate to his position, the conclusion in favour of the Plaintiff is inevitable. The burden of proof lies on the Defendant to shew his intention to change his domicil of origin. It has been contended, that the testator's wife and children being resident in *England* the burden lies on the Plaintiff; but that is clearly a mistake: *Forbes* v. *Forbes* (1); *Phillimore* on Domicil (2). To establish a change of domicil of origin it is necessary to shew that the person whose domicil is in question intended to change his domicil, as distinguished from his nationality and allegiance: *Attorney-General* v. *Countess de Wahlstatt* (3); *Moorhouse* v. *Lord* (4). The cases of *Aitchison* v. *Dixon* (5) and *Haldane* v. *Eckford* (6) have no application to this case, which is peculiar in its circumstances.

Upon the whole, the testator's domicil has been shewn to be Scotch by origin and birth, and the necessary consequences must follow.

July 17. SIR JOHN WICKENS, V.C.:—

William Douglas, the testator in these causes, died in *England* on the 16th of February, 1869, leaving a widow, *Ellen Douglas*, and three children by her; one of whom, *William Charles*, was born on the 18th of June 1862, fourteen months before the marriage of his parents.

William Douglas had, besides considerable moveable property, a leasehold house at *Putney*, in *England*, and some heritable estate in *Scotland*. His will, in the English form, is dated the 21st of December, 1868. By it, the testator, after revoking all wills and testamentary dispositions by him theretofore made, gave to his widow his plate, furniture, wine, carriages, and horses, and stable and garden utensils, and his balance in the hands of his bankers, Messrs. *Coutts & Co.* And he bequeathed to his nephew Colonel *Douglas*, and *Patrick Webster*, whom he appointed executors, the leasehold house at *Putney*, in trust, to allow his widow to reside in

(1) Kay, 341. 16 Jur 643.
(2) *Passim.*
(3) 3 H. & C. 374.
(4) 10 H. L. C. 272, 292. 9 Jur NS. 677
(5) Law Rep. 10 Eq. 589.
(6) Ibid. 8 Eq. 631.

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

it; and after her death either to retain it as a residence for his children till the youngest should attain twenty-one, or to sell it, and hold the proceeds on the same trust as a legacy of £10,000 mentioned afterwards, with a proviso that it might be sold, with the widow's consent, in her lifetime; in which case she was to receive the income of the proceeds during her life, and the capital, afterwards, was to go as the £10,000. The testator further directed his executors to retain or provide out of his estate £3 per cent. stock equivalent to £7200 sterling, and pay the income to his widow for life; afterwards it was also to go as the £10,000; and he bequeathed to his executors £10,000 sterling, in trust for and to be equally divided among his children who should attain twenty-one, with the provisions for advancement, maintenance, and accumulations which are usual in similar cases. If no child of the testator's should attain twenty-one, the funds were to fall into the residue. The testator declared that the provisions made by his will for his wife should be taken by her in lieu, and bar, and in full satisfaction of all dower and thirds, and other rights and interests at common law or otherwise to which she might be entitled, out or in respect of any estate or estates which he might die seised or possessed of or entitled to in *Scotland* or elsewhere. And he left, bequeathed, gave, granted, assigned and disponed to Colonel *Douglas*, all the residue of his goods, gear, debts, and sums of money, and in general the whole of the residue of his moveable means, estate, and effects whatsoever, that might pertain to, be vesting in, or owing to him at the time of his decease. But always with and under the burden of all his just debts, death-bed, and funeral charges, and legacies and gifts thereinbefore by him given. And he thereby gave, granted, assigned, and disponed to and in favour of Colonel *Douglas*, his heirs, executors, and assignees, all and singular the lands and heritages, and in general the whole heritable and real estate and effects, of what kind or denomination soever and wheresoever situated, then belonging to him, or that should belong to him at the time of his decease.

The testator had, on the 19th of September, 1867, fifteen months before the date of his will, executed, with what his advisers and he considered the formalities required by the law of *Scotland* for the execution of deeds and testamentary documents, a trust disposition

and settlement; by which he gave, granted, disponed and assigned to and in favour of Colonel *Douglas*, and his heirs and assignees, an estate at *Brigton*, in *Forfarshire*, worth, it seems, about £400 a year; the only remaining portion of a family estate of considerable importance which had belonged to his ancestors. The testator seems to have had other heritable estate in *Scotland*, viz., a moiety of a house and land at *Broughty Ferry*, which is not noticed in the trust disposition. This latter property is said to produce about £45 a year.

Two suits are now before the Court. One (*Douglas* v. *Douglas*) by the testator's widow against the executors and the testator's three children; and the other (*Douglas* v. *Webster*) a cross suit by Colonel *Douglas*, the testator's residuary legatee, who was also one of his executors, against the other executor and the widow and children of the testator.

The Plaintiff in the first suit asserts that the testator's domicil was Scotch, and that she, as his widow, is entitled, if she chooses, to elect between the benefits given to her by his will, on the one hand, and one-third of his moveables and her terce in her heritable estate on the other. And she claims, or is alleged to claim, that the Court of Chancery shall give her the means of making such an election, by ascertaining the value of the subjects between which it is to be made, and giving her, in so far as it has jurisdiction to do so, the benefit of her election when made.

It is perhaps too broadly stated by Lord *Thurlow* in *Butricke* v. *Broadhurst* (1), whose dictum has been adopted by Mr. *Swanston* in the note to *Dillon* v. *Parker* (2), and other text writers, that the Court of Chancery will in all cases entertain a suit by a person put to election to ascertain the value of the objects between which election is to be made. No doubt there is, in almost all cases, jurisdiction in equity to compel a final election, so as to quiet the title of those interested in the objects of which one is to be chosen; and the Court, as a condition of compelling such a final election, secures to the person compelled to make it all the information necessary to guide him in doing so. It is also generally, though perhaps not universally, true that a person for whose benefit conditions will be imposed by the Court before it makes an order against him, can

(1) 1 Ves. 172. (2) 1 Sw. 381, n.

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

entitle himself to the benefit of the conditions by filing a bill and offering by it to submit to the order. But if, for instance, the *Brigton* estate in the present case had been given to a stranger, I do not at present feel satisfied that *Ellen Douglas*, if entitled to elect between her widow's rights and her legacy, could have sustained a bill against the executors and that stranger to have the value of the *Brigton* estate ascertained. It is not, however, necessary to consider this. Colonel *Douglas*, who is one of the executors and residuary legatee, also claims the bulk of the real estate, and what he does not take has devolved on the infant heir, who is before the Court, and makes no opposition. And Colonel *Douglas* has himself filed a cross bill, which, although it seeks to establish an English domicil in the testator, and therefore denies the widow's right of election altogether, prays (not conditionally, but absolutely) for a general administration of the personalty. Under all these circumstances the Court has, I think, jurisdiction on the hearing of these two causes to decide the question of the testator's domicil at the time of his will and of his death, on which depends the widow's alleged right to election, and also if she is held to have that right, to direct such inquiries as may be necessary to guide her in exercising it, and as far as possible to give effect to it.

The Plaintiff in *Douglas* v. *Douglas* asks, however, something beyond this; she desires to have it ascertained on whom the *Brigton* estate devolves; or, in other words, whether her election is to be made against her own son, or partly against him and partly and principally against Colonel *Douglas*, a stranger in blood to herself; and further, whether the election is to be made against her son born before the marriage, or her son born after the marriage. And she consequently asks a decision, not only on the question whether the trust disposition in favour of Colonel *Douglas* was revoked, but also on the question whether her first-born son is legitimate, which involves the question of the testator's domicil at the time of that son's birth and of the father's subsequent marriage. It seems to me that she is entitled to do so. Supposing the Court of Chancery to recognise and give effect to her right of election, it will also compensate, as far as possible, the persons disappointed by its exercise, which of course involves the ascertaining of them. Therefore, notwithstanding the elaborate argu-

ment addressed to me on the subject, I consider that the question where the testator was domiciled at the birth of his son *William Charles*, and the question whether the trust disposition of 1867 was revoked by the subsequent will, are properly before the Court of Chancery in this suit.

The question of domicil is that to which the voluminous evidence was principally directed, and which was principally argued at the hearing. It arises in a double form; for the domicil of origin of *William Douglas*, the testator, depends on the domicil of his father, *Robert Douglas*, at the time of *William's* birth; and it has been argued that *Robert*, though his domicil of origin was Scotch, had acquired at that time an English domicil. This contention seems groundless. *Robert*, the eldest son of a Scotch laird, of ancient family and considerable property, was sent to *Paris* in 1789, when he was sixteen years old, to be educated, it would seem, for the public service of *Great Britain*. On his return, in 1792, he became a clerk in the Home Office, and so continued till 1802. On the 24th of June in that year he married Mrs. *Webster*, the widow of a gentleman with whom he had been on very intimate terms, and who had died the year before. Mrs. *Webster* had considerable means, and *Robert Douglas*, who was then, it seems, in debt, but did not disclose the fact to his wife, shortly after his marriage resigned his clerkship in the Home Office, which produced him £300 a year, and lived with his wife, and apparently on his wife's means, at a succession of hired houses in *England*; visiting, however, *Scotland* in every year, and keeping up his connection with his family there. In 1811 the *Brigton* estate, which *Robert's* father had, in 1804, subjected to a trust disposition in favour of his creditors, was sold. *Robert* himself bought (principally, it seems, with money borrowed from his wife's trustees,) the mansion and grounds of *Brigton*, and some part of the estate immediately adjoining them. The rest, about two-thirds, perhaps, of the whole, was bought by Lord *Strathmore*. In September, 1814, *Robert's* father died. Very shortly afterwards, *Robert* refurnished *Brigton*, and made it fit for occupation; and he and his wife thenceforth resided there till his death in 1835.

That *Robert's* domicil of origin was Scotch was not and could not be denied. It is equally undeniable that his domicil from 1816,

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

when he was forty-three, to his death, was also Scotch. In order, therefore, to counteract the presumption that it was Scotch throughout, it would be necessary to shew, first, that he acquired another sole domicil by actual residence in *England*, with the intention of settling there; and secondly, that, after doing so, he changed his mind and settled in *Scotland*. I see no reason to believe that he ever changed his mind on the subject. It seems to me more than probable that when on his father's death he went to live in *Scotland* he was only doing that which he had always wished and intended to do if circumstances should make it feasible. But it is not necessary for the present purpose to determine more than that, on the 4th of August, 1803, when the testator was born, his father had not yet cast off his domicil of origin. Now, considering that he entered the Home Office when he was twenty, and continued in it till he was thirty, it is difficult to extract from his having lived in *London* lodgings while he discharged his duties as clerk in that office, any intention to settle finally and for life in *England*. The supposed change must be placed somewhere between the end of 1802, when he resigned his clerkship, or, at the earliest, the middle of 1802, when he seems first to have thought of resigning it, and August, 1803. At this latter time he was the heir-expectant of a large Scotch estate not yet encumbered, and which might never have been encumbered had his father died before 1804. His near relations were Scotch, and settled in *Scotland*, and it may be inferred that he was much attached to them. Either at the time of his marriage or at a time a little before it he certainly looked on *Brigton* as his home. It seems impossible to infer a deliberate intention of changing all this because when in some pecuniary distress, and tired probably of an occupation in which he rose very slowly, he married an English widow with a good jointure, while the much larger means which he might expect to succeed to were then in a state of expectancy.

Therefore the testator's domicil of origin was, I think, Scotch, though he was probably born in *England;* and the question arises whether this continued till his death or not.

The testator's personal history may be shortly stated as follows. At the death of his father, which took place on the 2nd of August, 1835, he was just thirty-two years old. Up to that time he had

from the age of thirteen or fourteen, lived at *Brigton* with his father and mother, without any further interruption than may have arisen from occasional visits or excursions. Some time in the latter part of the life of *Robert Douglas* the *Brigton* estate had been materially decreased by the sale of a further portion of it to Lord *Strathmore*, at the price of £18,000; and it seems to have consisted, when *Robert* died, of the mansion-house and grounds, and a single farm called the "home farm." Mrs. *Douglas*, the testator's mother, continued to live at *Brigton* after her husband's death, and the testator lived with her as before, the mother paying the immediate or whole expense of the indoor establishment, the son living with her and managing the farm, which was his own property, and was kept in hand. In 1846 Mrs. *Douglas* bought a house at *Broughty Ferry*, which is a seaside place on the *Firth of Tay*, ten or twelve miles from *Brigton*, and thenceforth till her death she occupied this house, which was called *Carbat House*, as her principal residence, her son living with her and still farming the land at *Brigton*, and yachting. This seems to have constituted his chief occupation. He occasionally visited *England*, and his visits seem to have been generally or always short ones. This state of things continued with little or no variation till September, 1857, when his mother died. Before this event the testator had become acquainted with a family of the name of *Rigge*, consisting of a mother and two daughters. Mrs. *Rigge*, the widow of a perfumer, lived, I infer, with her two daughters, who were milliners, in *New Bond Street*, and let lodgings. The testator, on his mother's death, came to *England*, where he seems to have spent two or three months, returning to *Scotland* in the spring of 1858. About that time *Carbat House*, the seaside residence of Mrs. *Douglas*, the testator's mother, was sold. He was in *England* in November, 1858, and apparently spent the winter there. At the beginning of the next year (1859) *Brigton House* was papered and painted. Nothing else remarkable seems to have occurred in that year, except that the testator then for the first time opened an account with a *London* banker. In 1860 a remarkable change occurred. In October of that year he let to a tenant named *Guthrie* the home farm at *Brigton*, which had up to that time been in his own hands, and about the same time he took a house in *Marlborough*

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

Terrace, Kingsland Road, to which, before the end of 1860, he removed with the Plaintiff in the original suit, then Miss *Ellen Rigge,* and where they lived together (it seems in a humble and obscure way) as man and wife for some months.

In September, 1861, he again removed, with Miss *Rigge,* to *Sommers Cottage* at *Brixton,* where his style of living was more in conformity with his means and position. Both in 1860 and 1861 he had made repeated visits to *Brigton,* and in the latter year the drawing-room there was newly furnished. In and throughout 1862 the testator's English residence was still at *Sommers Cottage,* and there, on the 18th of September, 1862, Miss *Rigge* was confined of a child, the Defendant, *William Charles Douglas.* Very soon after this the testator was in *Scotland,* where he had been in the earlier part of the same year, and with reference to the execution of a trust disposition of his heritable estate in favour of his nephew, *Charles William Douglas.*

In the autumn of the same year occurs the first mention of an intention on the testator's part to let *Brigton.* And this was actually done in the succeeding year. The mansion there was, in 1863, let for two years to a Mr. *Millar.* The testator, though he is said to have originally wished to let it for five years, declining eventually to part with it for more than two years certain. The testator reserved to himself two rooms for the preservation of his furniture; but no servant of his remained there, and from this time forth, during the remainder of his life (between five and six years), he had no establishment in *Scotland.* In August of the same year he married Miss *Rigge,* at *Folkestone,* in *Kent.*

The Counsel for Colonel *Douglas,* who assert that the testator's domicil at his death was English, and who argued that his domicil of origin was also English, do not deny that he must be considered a domiciled Scotchman from 1816, or thereabouts, till some time after his mother's death in 1857. Of course it would lie on them to prove the change, whether his Scotch domicil was a domicil of origin or acquired. For many purposes, no doubt, a domicil of origin requires more to change it than a domicil of acquisition. Independently of any authority, nothing is easier to understand than that a Scotchman by birth considers himself to be a Scotchman in a much more definite and solemn sense than that in which

a Scotchman who has acquired an English domicil by settling in *England* considers himself to be an Englishman. But in this case, if the testator's Scotch domicil had been an acquired and not an original domicil, it was so acquired as to resemble an original domicil rather than an acquired one. For it can hardly be doubted that from the age of twelve, or thirteen at any rate, the testator had no idea of any home except a Scotch home, and thought of his father as a Scotch laird, and nothing else. Hence I conceive that if the testator's domicil of origin had been English, the burthen on those who contend that he changed his then Scotch domicil after his mother's death would be hardly lighter than if it had been Scotch, as I hold it to have been. In any case the onus of shewing a change lies on them. It is universally, or all but universally, true, that in order to prove that the domicil of an adult of sound mind has been changed an intention on his part must be shewn. The question on which opinions have differed is as to what he must be shewn to have intended. According to one view, it is sufficient to shew that he intended to settle in a new country; to establish his principal or sole and permanent home there, though the legal consequences of so doing, on his civil *status*, may never have entered his mind. According to the other view, it is necessary to shew that he intended to change his civil *status*, to give up his position as, for purposes of civil *status*, a citizen of one country, and to assume a position as, for the like purposes, the citizen of another. This stricter view is supported by opinions of great weight, amongst others by the Lord President in *Donaldson* v. *McClure* (1); that of the Lord Chief Baron *Pollock* in *Attorney-General* v. *Countess de Wahlstatt* (2), and by some expressions used by the late Lords *Cranworth* and *Kingsdown*. And it would be an extremely convenient one, since if, for the purpose of shewing that a man had changed his domicil, it were necessary to shew that the notion of a change of the civil *status* had occurred to his mind and been accepted by his will, the attempt would in most cases fail. Few men think of or wish for a change of civil domicil as such, except, perhaps, in certain cases where a man desiring to change his political domicil contemplates the change of civil domicil as

(1) 20 Court of Sess. Cas. (2nd Series) 307.
(2) 3 H. & C. 374.

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

involved in it, and occasionally where the object of the change is to escape into a freer condition of marriage law. And cases like *Haldane* v. *Eckford* (1), where the change of civil *status* can be shewn to have been recognised and accepted by a person who had no special reason to desire it, and probably did not desire it, are very rare indeed. The stricter rule would, therefore, in the great majority of cases, leave the domicil to be governed by origin, which, it seems to me, would be in every respect a convenient view. In this case, if I considered the stricter rule as law, I should have no difficulty whatever in holding that the testator never changed his domicil. I feel sure that the idea of changing his civil *status* from that of a Scotchman, under Scotch law, to that of an Englishman, under English law, never occurred to him, and that if it had occurred to him he would have repudiated it. Probably the question as to his eldest son's legitimacy would of itself have been conclusive on this point.

But I cannot satisfy myself that the stricter rule, as I have called it, can be considered as the law of *England*. It never was I believe the law of any other country, except perhaps *Scotland*, or recognised as law by any of the text writers of European authority who have dealt with questions of domicil, and it is difficult to believe that the law of *England* has drifted so far from the general principles on which it professed to be founded and which it always professed to follow. It seems to me, as it did to Vice-Chancellor *James*, in *Haldane* v. *Eckford*, that the intention required for a change of domicil, as distinguished from the action embodying it, is an intention to settle in a new country as a permanent home, and that if this intention exists and is sufficiently carried into effect certain legal consequences follow from it, whether such consequences were intended or not, and perhaps even though the person in question may have intended the exact contrary. The case of a person wishing to settle permanently in a country different from that of his domicil, but to retain, as regards testamentary and matrimonial matters, and as regards civil *status* generally, the law of the country that he leaves, may have rarely arisen and is perhaps not likely to arise. When it arises, if it ever should arise, the determination ought, I think, to

(1) Law Rep. 8 Eq. 631.

be, that the intention was sufficient to warrant a conclusion in favour of a change of domicil. It may, perhaps, be added, that to prove such an intention as is necessary to establish a change of domicil, and in the absence of evidence that the intention actually existed (which can be shewn by express declaration, and in no other way) the evidence must lead to the inference that if the question had been formally submitted to the person whose domicil is in question, he would have expressed his wish in favour of a change. Possibly where the actual residence in the acquired domicil has been very long an unconscious change of mind may be inferred, though it may be doubtful whether it would have been declared or admitted if the question had been actually raised. Such unconscious changes of opinion on the most important subjects happen not unfrequently in such a space of time as the thirty-two years residence in *England*, which occurred in *Udny* v. *Udny* (1). But in cases not involving a very long time, I apprehend that in order to establish a change of domicil it must be shewn that the intention required actually existed, or made reasonably certain that it would have been formed or expressed if the question had arisen in a form requiring a deliberate or solemn determination.

What, therefore, has to be here considered is, whether the testator *William Douglas* ever actually declared a final and deliberate intention of settling in *England*, or whether his conduct and declarations lead to the belief that he would have declared such an intention if the necessity of making his election between the countries had arisen. Any suggestion as to unconscious change in a long space of time can hardly apply to this case. For it seems impossible to date his supposed intentions of change of domicil before his marriage and the first letting of *Brigton* house, both of which events occurred in the latter half of 1863, and therefore less than six years before his death. In these six years his connection with *Scotland* was no doubt lessened; and it seems to me far from impossible that if he had lived longer it might have ceased altogether. Throughout 1864 he resided in *England*, and in June of that year he gave up his pew in the Episcopal chapel which he had attended while living in *Scotland*. In

(1) Law Rep. 1 H. L., Sc. 441.

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

January, 1865, his second child was born; in the same year he agreed to grant an additional term of three years to the tenant of *Brigton* house (in which he still reserved rooms), and thought of buying, but did not buy, a freehold estate at *Harrow*. In December of the same year he bought the long leasehold house at *Putney*, which he afterwards bequeathed to his widow. This house he bought for the express purpose of making it a jointure house, and without any intention of living in it himself. The year 1865 was remarkable also as the last year in which he visited *Scotland*. In 1866 his third child was born, and he removed to a house in *Streatham*, which, in the next year, 1867, he took for a term of little over five years. In the latter year, 1867, he meditated, but did not complete, another purchase of freehold land in *England*, and closed the banking account which he had up to that time kept at the *Royal Bank of Scotland*. In the same year certain circumstances occurred which were much relied on by the Plaintiff in the cross suit, but which, when duly considered, seem of no weight. The testator was an habitual maker of wills, and in 1867 he made one, the seventh or eighth I think, of which there are traces. While making this, which was in the English form, a well-founded doubt occurred to him whether it would pass his real estate in *Scotland*, and being advised that it would not do so, he, on the 19th of September, 1867, executed the trust disposition of *Brigton* under which Colonel *Douglas* claims. This circumstance was relied on in argument as bringing the case within *Haldane* v. *Eckford* (1), where a testator's recognition of himself as being under the law of *Jersey*, for certain testamentary purposes, was held tantamount to a declaration that he had intended to acquire, and considered himself to have acquired, a *Jersey* civil domicil. But the argument entirely fails. A domiciled Scotchman can, according to Scotch law, and independently of the Act 24 & 25 Vict. c. 114, which in 1867 had been some years in force, make a valid will as to moveables, if he does so according to the forms of the country in which he is resident; and if this be kept in mind, the inference that the testator considered himself a domiciled Englishman, because he considered it clear that his moveable property would pass by an English will,

(1) Law Rep. 8 Eq. 631.

appears to fail altogether. To revert to the narrative of the testator's life, he seems, in 1868, to have relaxed still further his hold on *Brigton* by giving up part of the rooms which he had reserved to himself in the house, and transporting to *England* or selling some of the furniture which remained there; and in June of that year he agreed to grant to the tenant a further term of three years from Whitsuntide, 1869. On the 16th of February, 1869, he died.

I have mentioned, I believe, the principal circumstances which are relied on as evidence that the testator, on or after 1863, changed his domicil from a Scotch one to an English one. There is no allegation of any declared intention on his part to settle finally out of *Scotland*. If anything, the evidence of declarations, though in no way conclusive, seems to me the other way. The change must be established, if at all, as an inference from facts, and without the important element of any such lapse of time as can, for the present purpose, be considered a long one. It seems to me that, when carefully looked at, the facts do not warrant the inference which, on behalf of Colonel *Douglas*, it is sought to draw from them. The circumstance of the alleged domicil being the residence of the testator's wife and children has been much relied on in *Forbes* v. *Forbes* (1), and other cases, though the supposed rule that a man will be considered as domiciled where his wife and children permanently reside, which is referred to in the head-note in *Aitchison* v. *Dixon* (2), seems not to be established by the judgment in that case, or by *Forbes* v. *Forbes*, and is hardly to be reconciled either with the general tenor of the authorities, or with principle. And it may not be immaterial to remark, that the relation between the testator in this case and his wife and children was not quite the normal one, so that the general rule, if it existed, might not apply quite as strongly as in ordinary cases. He certainly had some hesitation in introducing his wife to his family in *Scotland* as his wife; and there is evidence that he never considered either of his sons, though the younger one was undoubtedly legitimate, as his heir in the sense of being the person to succeed to the *Brigton* estates, and be the Scotch head of his own branch of his ancient family. The fair inference from the

(1) Kay, 341. 18 Jur. 643 (2) Law Rep. 10 Eq. 589.

V.-C. W. 1871

DOUGLAS v. DOUGLAS.

DOUGLAS v. WEBSTER.

facts seems to be that, though the testator intended his wife to live in *England* after his death, which (considering the disposition of his Scotch property) was the natural arrangement, he had not, at least up to the date of his last will, definitively abandoned the idea of returning to *Brigton* himself, and believed that after a certain time, and possibly a tentative visit or two, he might do so with Mrs. *Douglas* and his children; so that, in fact, he never contemplated *England* as the site of his ultimate matrimonial home if his life and his wife's were prolonged. That he was a man accustomed to change his mind appears from his numerous wills, and indeed from his whole history. It is clear that he did not consider any of the places which he successively occupied in *England* as his settled and ultimate home. Though all the places which he took active steps to buy were in *England*, there seems no reason to doubt, and some reason for believing, that even if he ultimately abandoned *Brigton*, he would have availed himself of any very favourable opportunity that offered itself of buying a place of residence in some other part of *Scotland*. That he wished to make, in some place which he never discovered, a home more permanent than he possessed after *Brigton* ceased for a time to be his home, seems clear. That he tried in vain to find it in *England* seems also clear. But it is not clear that he had made up his mind to find it there, and there only.

The true conclusion from the facts seems to be, that the testator remained from 1863 to his death in a state of mind which might have resulted in his determining to settle in *England* permanently, but which never did so result; that if he had lived a few years longer, and had found by experiment that Mrs. *Douglas* and his children would be welcomed or tolerated in society at *Brigton*, he would have transferred himself there; that if this proved unfavourable, he would have sought another home in *England* or *Scotland*, as might happen to be convenient; and that, in fact, he remained to the end of his life undecided on the point which is now in question. If so, the onus which lies on those who assert a change of domicil has not been discharged; and, without denying that the case is a peculiar and difficult one, I think, after anxiously weighing all the evidence, of which, of course, I have noticed part only, that the domicil of *William Douglas*, the testator, was Scotch from his birth to his death.

If this be the true conclusion, the widow had originally a right to elect between her rights as a Scotch widow and her rights under the will. That she made no binding election before filing the bill seems to be clear, having regard to the principles on which the Court deals with such elections. And the bill, which was obviously not intended as an election, cannot be treated as amounting to one.

The decree must, I think, be made in both suits, and will be substantially according to the minutes prepared on behalf of the Plaintiff in the original suit. But it will be better to place first the declaration as to domicil, and let the account and inquiries follow.

Solicitors for the Plaintiff and her Children (who were Defendants): Messrs. *Burgoyne, Milnes, Burgoyne, & Thrupp.*

Solicitor for the Defendants Colonel *Douglas* and *Patrick Webster:* Mr. *W. M. Webster.*

END OF VOL. XII.

INDEX.

ABANDONED RAILWAY—Costs of transfer—Deposit money - - - 454
See COSTS UNDER RAILWAYS ABANDONMENT ACT.

ABANDONMENT OF SHARES — *Companies — Agreement for Purchase of Goodwill—Allotment of Shares to Directors "for distribution amongst their Shareholders" — Release — Return of Call Moneys—Specific Performance—Delay—Standing by.*] By an agreement in June, 1864, between two limited banking companies, it was agreed that company *L.* should be dissolved, and that their goodwill should be taken over by company *M.*; that *M.* should increase their capital, and that 10,000 of the new shares, credited with £10 each, should be "allotted at par to the directors" of *L.* "for distribution amongst their shareholders," the *L.* directors paying £100,000 consideration for the new shares to be issued to them. Of the 10,000 shares only 9740 were applied for and allotted to *L.* shareholders. In 1865 the *L.* directors issued a circular to their shareholders dissuading them from taking *M.* shares. In 1866 the *M.* bank made a call, which was badly met, and many shares were forfeited in consequence, including some held by the liquidators of the *L.* bank. In March, 1867, a mutual release was executed between the companies. It recited that the £100,000 had been paid, and (inconsistently with the fact) that the *M.* bank had duly allotted to such persons as the liquidators of the *L.* bank directed the 10,000 shares mentioned in the agreement. In November, 1867, a right to "a large number" of unissued *M.* shares was asserted by the secretary of the *L.* liquidators in a letter, but no step was taken. In September, 1868, a formal demand was made by the solicitors of the *L.* liquidators for the remaining shares.—In February, 1869, the *M.* bank was wound up, and the *M.* liquidators made a return of £5 10*s.* per share to their shareholders, calls having been made upon them and paid for moneys which were found not to be required.—Upon the *L.* liquidators claiming to be entitled, on behalf of the *L.* shareholders, to participate in the return to the extent of 260 £10 shares:—*Held*, that the agreement was now incapable of specific performance; and summons dismissed. *In re* MERCANTILE AND EXCHANGE BANK. *Ex parte* LONDON BANK OF SCOTLAND - 268

ACCOMMODATION BILLS—Proof against drawer—Letter of credit - - - 501
See LETTER OF CREDIT.

ACCOUNT—Agent and principal—Opening accounts of composition deed - 64
See BANKRUPTCY JURISDICTION.

—— Lessee of mines—Equitable lessee - 403
See MINING LEASE.

—— Partnership - - - - 586
See PARTNERSHIP ACCOUNTS.

ACCUMULATIONS — *Will — Annuities — Bequest to Charities—Direction to accumulate Surplus—Thellusson Act.*] Testator bequeathed annuities, and directed his trustees, in case the annual income of the trust moneys should not be sufficient for them, to apportion the deficiency rateably; and that in case of there being any surplus income they should invest it every year, and after the decease of the surviving annuitant should convert the trust property and stand possessed of the moneys and the accumulations in trust to pay and divide the same into the several public charities named (five in number), according to the amounts (£100 in each case) set after their names. The testator had no next of kin. After completely providing for the annuities there was a large surplus, consisting of pure and impure personalty:—*Held*, that the five charities were entitled equally to the whole of the residuary pure personalty, and the accumulations during the period of twenty-one years from the death of the testator; and that the Crown was entitled to the impure personalty:—*Held* also, that the charities were not entitled to have the accumulations stopped, and to be paid at once, but that the accumulations must go on till further order. HARBIN *v.* MASTERMAN - - - - - 559

ACKNOWLEDGMENT—Statute of Limitations—Mortgage—Payment of interest - 41
See LIMITATIONS, STATUTE OF. 1.

ADMINISTRATION—Banker's balance—Executorship account - - - 98
See BANKERS' ACCOUNT.

—— Bill for accounts of partnership - 547
See MULTIFARIOUSNESS.

—— Concurrent creditors' suits — Conduct of cause - - - - - 479
See CONCURRENT SUITS.

—— Costs in suit - - - - 614
See COSTS IN ADMINISTRATION SUIT.

—— Exoneration of personalty from debts — Specific bequest of personal estate 175
See EXONERATION OF PERSONALTY.

ADMINISTRATION—*continued.*

—— Retainer by executor - - - 570
See Retainer by Executor.

—— Scotch curator—English administration 319
See Scotch Curator Bonis.

—— Specialty debt—Interest on bond after testator's death - - - - 89
See Specialty Debt. 1.

—— Specialty debt—Covenant for further assurance - - - - - 155
See Specialty Debt. 2.

—— With will annexed - - - 309
See Administration with Will annexed.

ADMINISTRATION WITH WILL ANNEXED—*Vendor and Purchaser—Legal Estate—Leaseholds—Will—Devise in Trust—Disclaimer by Trustees—Declaration and Order for Sale.*] Testator bequeathed leaseholds to trustees, upon trust to pay the rents and observe the covenants, and subject thereto, during the life of his wife, to pay the rents unto and equally amongst all his nephews and nieces (naming eleven persons) who should be living, and the children of such as should be dead, in equal shares as tenants in common: and after her death, to divide the rents into three equal parts, and pay one part to each of his three nieces (naming three of the persons before named) for life; after the decease of each, the capital of the third to be in trust for her children; if either should die without leaving a child surviving, the share to be held in trust for the nephews and nieces then living, and the children of those then dead. He bequeathed the residue to all his nephews and nieces who should be living at his decease, and the children of such of them as should be dead, in equal shares. The will contained a power to the trustees to sell "if and when they shall think fit so to do, for the purpose of division or distribution."—The two surviving trustees, who were also appointed executors, renounced and disclaimed, and administration with the will annexed was taken out by one of the nephews.—The debts having been all paid, a bill was filed by another nephew, to which the administrator and the other beneficiaries were parties, for administration; and in this suit a decree was made, declaring that the share of a niece, who had died in the testator's lifetime without issue, had passed to the other nephews and nieces, and ordering a sale of the leaseholds:—*Held*, that the legal estate in the leaseholds was in the administrator, and that it was not necessary that the beneficiaries should join in the conveyance to a purchaser. Wyman *v.* Carter - 309

ADVERSE POSSESSION—Possession by agent 149
See Limitations, Statute of. 2.

ADVICE OF COURT—Petition for - - 77
See Investment in Land.

—— Petition for—22 & 23 Vict. c. 35—Power of leasing - - - - 124
See Power of Leasing.

AFTERBORN CHILDREN - - - 427
See Gift to Children at Twenty-one.

AGENT—Accounts—Compensation deed executed by principal - - - 64
See Bankruptcy Jurisdiction.

AGENT—*continued.*

—— Fiduciary relation—Sale to agent - 320
See Sale at Undervalue.

—— Possession by - - - - 149
See Limitations, Statute of. 2.

AGREEMENT—Directors of company—Informal letter - - - - 246
See Powers of Directors.

—— Specific performance of part of - 18
See Specific Performance, Negative Stipulation.

AMENDMENT—Bill—Withdrawal of charges—Costs - - - - 24
See Unfounded Allegations in Bill.

ANNUITY—Accumulations of surplus—Gift to charity - - - - 559
See Accumulations.

—— Charged on land in *England*—Foreign domicil—Legacy duty - - - 464
See Legacy Duty.

—— Condition for payment of - - 225
See Conditional Gift. 1.

APPEAL—Costs—Sussessful Appellant - 596
See Costs of Appeal.

APPOINTMENT OF TRUSTEES—Trustee Act
See Trustee Act. 1, 2. [61, 214

APPOINTMENT WITHOUT REFERENCE TO POWER—*Power to appoint Part of an Estate coupled with Interest in the Residue—Devise of "the whole of my Property, real and personal"—Will not an Exercise of the Power.*] Under a marriage settlement, dated in 1840, power was reserved to the husband to appoint, after the death of his wife, if she should survive him, "so much" of a particular freehold estate settled by him "as shall not exceed the annual income of £300," to the use of the children of the marriage; the same to be, in default of appointment, for the use of the children equally. The residue of the estate to be to the use of the husband, absolutely.—By his will the husband gave, devised, and bequeathed "the whole of my property real and personal, consisting of a farm" (describing the freehold estate above mentioned), "and whatever may devolve to me by virtue of the marriage settlement," to a trustee, upon trust, after the death of his wife, for his five children, in unequal shares. He further gave to the trustee a discretionary power either to divide the income of "my entire property," according to the provisions before made, or to sell the whole, and divide the proceeds:—*Held*, that the will did not operate as an exercise of the power of appointment. Wildbore *v.* Gregory 482

APPORTIONMENT OF MORTGAGE DEBT—*Primary and Secondary Securities—Fluctuating Debt.*] A testator having devised estates *A.* and *B.*, deposited the title-deeds of *A.* with his bankers to secure any balance that might be due from him, and being largely indebted and unable to satisfy the debt, and requiring further small advances, deposited with the bank the title-deeds of *B.* The debt remaining due at his death;—*Held*, that the amount due up to the time of the second deposit was payable out of *A.*; and the amount accrued subsequently out of *A.* and *B.*

APPORTIONMENT OF MORTGAGE DEBT—*cont.*
rateably; the value of *A.* to be computed after payment of the previous mortgage. De Rochefort *v.* Dawes - - - - 540

ASSETS—Legal and equitable of - - 570
See Retainer by Executor.

ASSIGNMENT—Contract to purchase land 13
See Sub-contract.

ATTORNEY-GENERAL — Costs of proceedings before - - - - 262
See Costs in the Cause.

BANKER—Balance of account—Mortgage - 540
See Apportionment of Mortgage Debt.
—— Executorship account - - - 98
See Bankers' Account.

BANKERS' ACCOUNT—*Administration—Executorship Account.*] *A.* being indebted at his death to a bank in a sum, as a security for which he had deposited with them the title-deeds of an estate, by his will empowered his executors to charge his real estates in aid of his personal estates. On application by *A.*'s widow and sole executrix *B.* to draw on her late husband's account, the bank refused to honour cheques drawn by her in her personal character; but opened an account intituled "*A.*'s Executors' Account," and honoured cheques upon it signed "*B.*, for executors of *A.*" Of the moneys drawn out from time to time the bulk was applied by *B.* for the personal expenses of herself and her children, and in various speculations with regard to the purchase, sale, and farming of land. The amount due to the bank having increased greatly since *A.*'s death, and the estate comprised in the security held by them being insufficient when realised to satisfy the debt:—*Held*,, that the bank were entitled to prove against the general estate of *A.* for the balance due to them in respect of the sums drawn out by *B.* on the executorship account. Farhall *v.* Farhall - - - 98

BANKRUPTCY — Costs of successful appellant
See Costs of Appeal. [596
—— Execution creditor - - - 207
See Execution Creditor. 2.
—— Fraudulent preference - - - 358
See Fraudulent Preference.
—— Injunction restraining sale by liquidators
See Injunction in Bankruptcy. [137
—— Opening accounts of creditor's deed—Jurisdiction of Chancery - - 64
See Bankruptcy Jurisdiction.
—— Order and disposition - - 354, 598
See Order and Disposition. 1, 2.
—— Proof by receiver—Authority - 614
See Receiver.
—— Trustee—Appointment of new trustee 61
See Trustee Act.

BANKRUPTCY JURISDICTION — *Principal and Agent—Account—Debtor and Creditor—Composition Deed.*] The Defendant acted as the Plaintiff's agent in certain commercial transactions previously and up to July, 1867. In that month the Plaintiff fell into pecuniary difficulties, and executed a composition deed under the *Bankruptcy Act*, 1861, whereby he covenanted

BANKRUPTCY JURISDICTION—*continued.*
to pay a composition of 8*s.* in the pound to his creditors, and they released him from all his liabilities. The Defendant was not present at the meeting at which the composition was agreed upon, and the proper majority of creditors was obtained without reference to him; but he afterwards claimed to be a creditor of the Plaintiff in respect of the said transactions for £300, and his name was inserted in the schedule of the deed as a creditor for that amount, and he assented to the deed and received the composition payable thereunder. Afterwards the Plaintiff filed a bill for an account charging numerous false entries in the accounts rendered by the Defendant:—*Held*, that the composition deed was no bar to a decree for account in favour of the Plaintiff. Pike *v.* Dickinson - - - - - 64

BENEFIT BUILDING SOCIETY - - 516
See Building Society.

BENEFIT OF SURVIVORSHIP - - 302
See Death coupled with a Contingency.

BILL OF EXCHANGE—Contract of indemnity—Proof in winding-up - - 501
See Letter of Credit.

BILL OF SALE—Agreement to give - 598
See Order and Disposition. 2.

BISHOP—Right to proceeds of sequestration 494
See Sequestration.

BOND—Interest—Arrears of, after obligor's death
See Specialty Debt. 1. [89

BORROWING POWERS - - - 516
See Building Society.

BREACH OF TRUST—Directors of company—Recovery of fund - - - 386
See Breach of Trust by Directors.
—— Loss of trust fund - - - 373
See Investment by Trustees.

BREACH OF TRUST BY DIRECTORS — *Suit to recover Moneys improperly received and applied—Directors not made Parties to Suit.*] The manager of a benefit building society, established pursuant to 6 & 7 Will. 4, c. 32, deposited, with the knowledge of the directors, but contrary to the provisions of the Act, part of the society's money with a finance company of which he was also manager. The company gave a cheque to the said manager for the repayment of the money to the building society, but he did not pay over the money to the society, and afterwards died. The trustees of the building society thereupon, with the sanction of the directors, filed a bill against the finance company to recover payment of the money, but the directors were not made parties to the suit:—*Held*, that the suit could not be sustained, and that the remedy, if any, was at law. Hardy *v.* Metropolitan Land and Finance Company 386

BUILDING SOCIETY — *Borrowing Powers — Unauthorized Application of Funds — Mortgage by Deposit.*] 1. The objects of a building society on the permanent principle, as stated in its certified rules, were to raise a fund for the purpose of enabling its members to purchase freehold land or other real or leasehold estate; to erect suitable cottages and other buildings thereon; to provide the means for the profitable investment of small

BUILDING SOCIETY—*continued.*
savings; and in cases of accidental death to relieve the widows and families of deceased shareholders by adding the interest and estimated profits of the current year on the withdrawal of their shares at the time of death.—The rules contained no borrowing power, but in August, 1867, an alteration in the rules, giving the directors "power from time to time to borrow for the purposes of the society such sums and at such rates of interest and under such terms and conditions as they might think proper and expedient," was certified by the barrister:—*Held*, that the borrowing power conferred by this altered rule was strictly limited to the purposes of the society as stated in the 1st rule, and that persons who had lent money to the directors, which was employed in a loan to another society, could not enforce their claim under the winding up of the society.—2. A loan to a building society was secured by the promissory note of the trustees, and by a deposit of the mortgage deeds executed by members of the society:—*Held* (without deciding upon the right of the lender to enforce his security against the society), that the official liquidator was not entitled, without payment of the money advanced, to deprive the lender of his securities. *In re* Durham County Permanent Investment, Land, and Building Society. Davis' Case. Wilson's Case - - - - - - - 516

CALLS—Compromise as to amount of - 1
See Past Member.

—— Return of - - - - 268
See Abandonment of Shares.

CAPITAL—Partnership—What is - - 586
See Partnership Accounts.

CARRIAGEWAY OR FOOTWAY—*Grant—Right of Way—Construction—Right for Person to use Roadway — Pleading — Multifariousness.*] By a lease a demise was made of a dry dock described as bounded on the west by a roadway or passage running between the dock and certain newly-erected warehouses, together with free liberty and right of way for the lessee, his workmen and servants, and all other persons and person, by his authority or permission, from time to time, and at all times thereafter during the continuance of the demise, in, by, through, and over the said roadway, lying to the west of the demised premises, jointly with the lessor and his tenants.—Between the dock and the warehouses was a strip of land of twenty-three feet in breadth. At the date of the lease that part of the strip, fourteen feet in breadth, which lay nearest to the warehouses, was paved, and there was at the extremity of the pavement a strong curb three inches high. On this curb a strong fence was erected either before or soon after the date of the lease:—*Held*, that the right of way conferred by the lease extended over the whole strip, and not merely to the portion of it adjacent to the dock; but that it was confined to foot-passengers.—A bill against a person who has agreed to grant a lease to the Plaintiff, and against a tenant of the intended lessor, claiming under a lease prior to the agreement, praying for specific performance of the agreement by the lessor for a lease, and for an injunction to restrain the tenant from exercising

CARRIAGEWAY OR FOOTWAY—*continued.*
rights over the land agreed to be leased, contrary to the terms of the agreement, is multifarious.—An objection for multifariousness ought to be taken by demurrer; it is too late to raise such an objection at the hearing. Cousens *v.* Rose 366

CASES—*Aitchison* v. *Dixon* (Law Rep. 10 Eq. 589) considered - - - - 617
See Domicil of Origin.

—— *Attorney-General* v. *Countess de Wahlstatt* (3 H. & C. 374) considered - 617
See Domicil of Origin.

—— *Attorney-General* v. *Lucas* (2 Ph. 753) followed
See Settlement by the Court. 2. [38

—— *Bateman* v. *Gray* (Law Rep. 6 Eq. 215) considered - - - - 427
See Gift to Children at Twenty-one.

—— *Butricke* v. *Broadhurst* (1 Ves. 171) considered - - - - 617
See Election, Doctrine of.

—— *Cox* v. *Bishop* (8 D. M. & G. 515) considered
See Mining Lease. [408

—— *Dillon* v. *Parker* (1 Sw. 381, n.) considered 617
See Election, Doctrine of.

—— *Donaldson* v. *M'Clure* (20 Court of Sess. Cas. (2nd Series) 307) considered - 617
See Domicil of Origin.

—— *Haldane* v. *Eckford* (Law Rep. 8 Eq. 631) considered - - - - 617
See Domicil of Origin.

—— *Iredell* v. *Iredell* (25 Beav. 485) considered [427
See Gift to Children at Twenty-one.

—— *Macrae* v. *Ellerton* (6 W. R. 851) considered
See Foreclosure Suit. 2. [459

—— *Moorhouse* v. *Lord* (10 H. L. Ca. 272) considered - - - - 617
See Domicil of Origin.

—— *Mounsey* v. *Barnham* (1 Hare, 52) not followed - - - - 24
See Unfounded Allegations in Bill.

—— *Natal, &c., Company, Re* (1 H. & M. 639) considered - - - - 188
See Winding-up Petition. 3.

—— *Roddam* v. *Morley* (1 De G. & J. 1) affirmed
See Limitations, Statute of. 1. [41

—— *Sea and River Marine Insurance Company, In re* (Law Rep. 2 Eq. 545) considered
See Winding-up Petition. 3. [188

—— *Spitalfields School, In re* (Law Rep. 10 Eq. 671) not followed - - - 537
See Costs under Act of Parliament. 2.

—— *Taylor's Estate, In re* (Law Rep. 1 Eq. 495) followed - - - - 614
See Costs in Administration Suit.

—— *Udny* v. *Udny* (Law Rep. 1 H. L., Sc. 441) considered - - - - 617
See Domicil of Origin.

—— *Walters* v. *Northern Coal Company* (5 D. M. & G. 629) considered - - 408
See Mining Lease.

CHARGE—Debts on real estate - - 175
See Exoneration of Personalty.

CHARITY—Ambiguous description in will. 183
See Cy-près.

CHARITY—*continued.*
—— Bequest to—Accumulations of surplus of annuities - - - - 595
See Accumulations.
—— Contingent gift - - - 544
See Mortmain. 3.
—— Convent of nuns—Sisters of Charity - 574
See Mortmain. 4.
—— Endowment of future church - - 201
See Mortmain. 1.
—— Power to hold land to specified amount—Power to take impure personalty 444
See Mortmain. 2.

CHARTERPARTY—Notice of—Lien for freight
See General Ship. [378

CHILDREN—Gift to wife and children 316, 432
See Gift to Wife and Children. 1, 2.
—— Illegitimate - - - - 16
See Illegitimate Children.

CHURCH—Bequest for building—Contingent gift
See Mortmain. 3. [544
—— Endowment of future church - - 201
See Mortmain. 1.

CHURCH DISCIPLINE ACT—Sequestration—Proceeds of living - - - 494
See Sequestration.

CIVIL STATUS—Intention to change - 617
See Domicil of Origin. 2.

CLASS—Children who shall attain twenty-one 427
See Gift to Children at Twenty-one.
—— Gift in succession or to a class - 400
See Gift in Succession or to a Class.

CLERGY—Suspension for misconduct—Proceeds of sequestration - - - 494
See Sequestration.

CODICIL—Repetition of legacies - - 525
See Cumulative Gifts.
—— Republication by—Alteration of circumstances - - - - 290
See Conditional Gift. 2.

COLLIERY—Sale of—Parties to conveyance 472
See Sale by Liquidator.

COMPANY—Calls—Return of - - 268
See Abandonment of Shares.
—— Directors—Breach of trust by - 386
See Breach of Trust by Directors.
—— Directors—Contract with—Informal letter
See Powers of Directors. [246
—— Execution against—Motion to stay - 190
See Execution Creditor. 1.
—— Misrepresentation in prospectus - 331
See Misrepresentation in Prospectus.
—— Past member - - - - 1
See Past Member.
—— Reconstruction of - - 504, 509, n.
See Reconstruction of Company. 1, 2.
—— Shares—Abandonment of—Allotment to directors for distribution - - 268
See Abandonment of Shares.
—— Superfluous lands—Pre-emption - 9
See Superfluous Lands.
—— Winding-up Petition - - 26, 59, 188
See Winding-up Petition. 1, 2, 3.

COMPENSATION UNDER LANDS CLAUSES ACT—*Public Company—Notice to Treat—Interest created after Notice to Treat.*] An interest in property created by an agreement entered into by the owner after a notice to treat has been served on him, is not a subject for compensation under the *Lands Clauses Act*, 1845.—Where, therefore, the owner of property, after a notice to treat had been served on him, entered into an agreement with a person who had for several years occupied part of the property as weekly tenant for a lease of the same to him for a term of three years:—*Held*, that the tenant was not entitled to compensation in respect of the interest created by such agreement. *In re* Marylebone (Stingo Lane) Improvement Act. *Ex parte* Edwards [389

COMPROMISE—Official liquidator with shareholder - - - - 1
See Past Member.

COMPULSORY PURCHASE—Costs - - 537
See Costs under Act of Parliament. 2.

CONCURRENT SUITS—*Administration—Two Creditors' Suits—Conduct of Cause.*] A creditor took out a summons for the administration of a testator's personal estate only, which was insufficient. On the day following the hearing of the summons, another creditor, appearing by the solicitors who appeared for the Defendants to the summons, filed a bill for the administration of the personal estate, which bill he afterwards amended by making the heir-at-law a party, and praying for administration of both the real and personal estate, which together were sufficient. In the suit the same solicitors appeared for all parties. A decree having been obtained in the suit, the first creditor applied for leave to have the conduct of the cause:—*Held*, that the Plaintiff in the suit could not retain the advantage which had been unfairly obtained by him, and that the Plaintiff in the summons must have the conduct of the cause. Rhodes *v.* Barret. *Ex parte* Singleton [479

CONDITION—Will—Alteration of circumstances
See Conditional Gift. 2. [290
—— Will—Payment of annuity - - 225
See Conditional Gift. 1.
—— Will—Residence—Violation of duty - 604
See Conditional Gift. 3.

CONDITIONAL GIFT—*Will—Devise—Trust or Condition—Bill by Annuitant against specific Legatee—Parties—Demurrer overruled.*] Testator devised and bequeathed to his executors and trustees a lease of a house and premises in which his trading business was carried on, and all the stock-in-trade, fixtures, machinery, utensils, and effects at the time of his death used in the same business, and the goodwill of the same, upon trust to permit his son to carry on the business, and use and occupy the house, premises, and effects "upon the terms and conditions following;' that was to say—that he, the son, should, during the joint life of the testator's daughter, and widowhood of his widow, pay to each of them an annuity; and after various other provisions he directed that from and after the decease of the wife and daughter in the lifetime of the son, the trustees should execute to the son an assignment

CONDITIONAL GIFT—*continued.*

of the house, premises, fixtures, machinery, and effects. If the son should cease to carry on business, the above property was to be subject to the trusts of the testator's residuary estate, and the son was to be excluded from all benefit under the will. Testator then declared the trusts of his residuary personalty in favour of his wife, son, and daughter above mentioned.—A bill having been filed by the sole acting executor and trustee against the son and daughter for administration, in which it was alleged that the son had made default in payment of the annuities, and an answer having been filed by the son in which he stated that no application had been made to him by the daughter for payment of her annuity, and that it was his intention to pay the annuity bequeathed to the testator's wife, the daughter filed the present bill, praying for a declaration that she was entitled to the annuity bequeathed to her by the will, for an account, and other relief.—Upon demurrer to so much of the bill as prayed for the account and other relief, and answer as to the rest:—*Held*, that the Defendant had incurred a personal liability to pay the annuity, and that he had by his answer confessed an equity:—*Held*, further, that, under the circumstances, the executor was not a necessary party to the suit.—Demurrer for want of equity and want of parties overruled. Rees *v.* Engelback - - 225

2. —— *Will—Alteration of Circumstances—Republication by Codicil.*] *A.*, by will made in 1863, gave her house in *Z.*, "held under the Corporation of *X.* for the life of *T. K.*, and the term of twenty-one years after his death," and the furniture and effects in the house, her carriage and horses, pew in church, and a sum of £8000, to trustees upon trust during the lives of her nieces *B.* and *C.*, so long as they should remain single and reside in her said house in *Z.*, and keep the same in repair, to pay to them the rent of another house and the income of the £8000, and to permit them to reside in the said house during the remainder of the said term for which the said house was held of the Corporation of *X.* If either of them should marry or die before the expiration of the term, or should cease to reside in the house, £500 was to be paid to the one who married, and the rents and dividends were to be paid to the other in case she resided in the house, with a gift over in favour of another niece *D.*, in case both *B.* and *C.* should die or cease to occupy the house before the expiration of the said term.—*T. K.* died in 1865, whereupon the testatrix surrendered the estate, and obtained from the corporation a lease of the house at *Z.* for a term of seventy-five years:—*Held*, that, notwithstanding the surrender of the original lease, the trusts and conditions declared by the testatrix were valid for at least the period of twenty-one years from the death of *T. K.* Wedgwood *v.* Denton - 290

3. —— *Void Condition—Will and Codicil—Gift of Residue for Life—Residence.*] Testatrix, by her will, in 1867, gave the residue of her property to her niece, the wife of *W. W.* (who was carrying on a large business as a corn miller at *S.*) for life, with gifts over; and by a codicil, in 1869, she directed that all interest given by her will to her niece should go over, should she not

CONDITIONAL GIFT—*continued.*

cease to reside in *S.* within eighteen months of testatrix's death:—*Held*, upon the authority of *Mitchel* v. *Reynolds* (1 P. Wms. 181), that, as this was a condition which would require the niece to omit the doing of something that was a duty, it was void. Wilkinson *v.* Wilkinson - 604

CONDUCT OF CAUSE—Concurrent creditors' suits *See* Concurrent Suits. [479

CONFIRMATION OF SALES ACT—*Mortgage—Power of Sale—Sale by Mortgagee, with an exception of Minerals—25 & 26 Vict. c. 108—Service of Petition on subsequent Mortgagees.*] Mortgagees are within the *Confirmation of Sales Act*, and may have liberty to sell under their power of sale, with a reservation of the mines and minerals in the land sold, and incidental powers of working them.—It is not necessary for mortgagees, in order to exercise the power of selling with such a reservation, to serve the Petition on any subsequent incumbrancers. *In re* Beaumont's Mortgage Trusts - - - - - - 86

CONSIGNEE—Goods with forged trade-mark—Costs - - - 140
See Trade-mark.

CONTRACT—Assignment of - - - 13
See Sub-contract.

CONTRIBUTORY—Misrepresentation in prospectus - - - - 331
See Misrepresentation in Prospectus.

—— Past member - - - - 1
See Past Member.

CONVENT—Bequest to - - - 574
See Mortmain. 4.

CORPUS AND INCOME—Costs of trustees 111
See Costs of Trustee.

COSTS—Administration suit—Plaintiff deprived of conduct of cause - - 614
See Costs in Administration Suit.

—— Appeal in Bankruptcy—Successful appellant
See Costs of Appeal. [596

—— Between solicitor and client—Fiduciary relation - - - - 438
See Costs between Solicitor and Client.

—— Compulsory purchase—Statutory proceeding [537
See Costs under Act of Parliament. 2.

—— Costs in the cause - - - 262
See Costs in the Cause.

—— Dissentient shareholder—Reconstruction of company - - - - 504
See Reconstruction of Company. 1.

—— Foreclosure suit - - - 459
See Foreclosure Suit. 2.

—— Infringement of trade-mark—Lien on goods
See Trade-mark. [140

—— Lands Clauses Act - - - 418
See Costs under Lands Clauses Act.

—— Liquidator in winding-up - - 126
See Costs of Liquidation.

—— Payment out of Court—Abandoned railway [454
See Costs under Railways Abandonment Act.

COSTS—*continued.*

—— Payment out of Court—Special Act 488, 537
See Costs under Act of Parliament. 1, 2.

—— Proceedings before Attorney-General 262
See Costs in the Cause.

—— Security for - - - - 112
See Security for Costs.

—— Solicitor's charge on fund preserved - 115
See Solicitor's Lien.

—— Trustee—Petition for payment of dividends
See Costs of Trustee. [111

—— Unfounded allegations in bill - 24
See Unfounded Allegations in Bill.

—— Winding-up petition - - - 59
See Winding-up Petition. 2.

COSTS BETWEEN SOLICITOR AND CLIENT—*—Practice—Fiduciary relation between Parties—Fund applicable to the Payment of Costs.*] Where an unsuccessful party to a suit has been ordered to pay costs, it is not the practice of the Court to direct such costs to be taxed as between solicitor and client, except where a fiduciary relation exists between the parties, or where there is something in the nature of scandal, as where gross charges of fraud have been made and not sustained; but the Court may direct an unsuccessful party to pay the costs of a trustee as between solicitor and client, whether there is or not any fund out of which they may be paid. Turner *v.* Collins 438

COSTS IN ADMINISTRATION SUIT — *Plaintiff deprived of Conduct of Cause.*] A Plaintiff deprived of the conduct of an administration suit, who attended the taking of the accounts in Chambers:—*Held*, not entitled to his costs.—*In re Taylor's Estate* (Law Rep. 1 Eq. 495) followed. Armstrong *v.* Armstrong - - - 614

COSTS IN THE CAUSE—*Practice—Information—Proceedings before Attorney-General.*] 1. The costs of proceedings before the Attorney-General, for the purpose of obtaining his *fiat* for the filing of an information, rendered necessary by the opposition (unsuccessfully) raised by the Defendants, are costs of the cause payable by Defendants under a decree directing payment to Plaintiffs of their costs of the suit and of the information.—2. Pending their appeal from a decree against them in a suit by information and bill, the Defendants, with the view of influencing the result of the appeal, presented a memorial praying the Attorney-General to withdraw his *fiat*. The Plaintiffs presented a counter-memorial, and on hearing both parties, the Attorney-General refused to withdraw his *fiat*. Defendants subsequently obtained leave to withdraw their appeal on payment to Plaintiffs of such costs as Plaintiffs would have been entitled to receive if the appeal had been dismissed with costs:—*Held*, that the costs of the proceedings before the Attorney-General, pending the appeal, were costs in the cause payable by the Defendants. Attorney-General *v.* Corporation of Halifax - 262

COSTS OF APPEAL—*Bankruptcy.*] The Court of Bankruptcy follows the rule of the Court of Chancery as laid down in *Denny* v. *Hancock* (Law Rep. 6 Ch. 138); and will not, as a matter of course, give the costs of an appeal to a successful Appellant. *Ex parte* Mathews. *In re* Cherry 596

COSTS OF LIQUIDATION—*Winding-up—Mortgagee's Suit—Liquidator and Receiver—Costs of preserving and realising Assets of Company, and of general Liquidation.*] A company, having erected a hotel at *C.*, and another at *G.*, resolved to wind up, and appointed a liquidator. The voluntary winding-up was ordered to be continued under supervision. By agreement with *P.*, to whom the company were indebted for the erection of the hotel at *C.*, debentures to the amount of £25,000 were to be a first charge, and *P.* had an equitable mortgage subject thereto. He, by leave, filed a bill to enforce his claim, and asked for a sale of the property and for a receiver, and one was appointed; but, on appeal, that receiver was removed, and the liquidator was appointed receiver. In May, 1870, an order was, on the application of the liquidator and receiver, made that he should be at liberty to carry on the business of the hotels, and be allowed all proper expenses incurred in reference thereto. In July, 1870, orders were made approving of a contract entered into for a sale of the hotel at *C.* for £40,000; and that, upon its completion, the liquidator should pay *P.* what was due to him, or deposit a sum in a bank to answer his claim.—In September, 1870, *P.*, having been informed that only £30,000 could be obtained, consented to a sale (which was afterwards sanctioned by the Court) at that sum, and the money was paid to the liquidator.—On summonses in reference to this fund:—*Held*, that the liquidator's costs, charges, and expenses of the realisation of the property were payable out of the fund in priority to any claim of *P.* or of the debenture-holders; that the liquidator's costs of preservation of the property were, as between *P.* and the company, payable by them, but that the liquidator was entitled to be indemnified out of the fund for such of those costs as might not be paid out of the company's assets; and that the claims of *P.* and of the debenture-holders had priority over the general costs of liquidation. *In re* Oriental Hotels Company. Perry *v.* Oriental Hotels Company - - - 126

COSTS OF TRUSTEES — *Practice — Petition by Tenant for Life for Payment of Dividends.*] Costs of trustee, who was served with and appeared upon a Petition by tenant for life for payment of dividends, ordered to be paid out of income. *In re* Mason's Trusts. *Ex parte* Smithett - 111

COSTS UNDER ACT OF PARLIAMENT—*Local and Personal Act prior to Lands Clauses Act*, 1845—*Court of Exchequer—Transfer and Payment out of Court of Chancery.*] Purchase-money had been paid into the Court of Exchequer by a company incorporated under an Act prior to the *Lands Clauses Act* which provided that the Court should have power to order the "costs of all purchases," together with "the necessary costs of obtaining such order," to be paid by the company.—The costs of a Petition praying for the payment of the dividends of the investments of the purchase-money to a tenant for life, had been ordered by the Court of Exchequer to be paid by the company:—*Held*, that the Court of Chancery had no power to order the costs of a Petition for transfer of the fund and payment out of the dividends to a person beneficially entitled, to be paid by the company. *In re* Williams' Estate - 488

COSTS UNDER ACT OF PARLIAMENT—*cont.*

2. —— *Costs not specified—Settled Rule of the Court.*] In proceedings under statutes it is the settled rule of the Court that no costs can be awarded, except such as are authorized by the particular Act.—A proceeding under a statute is not a proceeding in equity.—*In re Spitalfields' School* (Law Rep. 10 Eq. 671) not followed. *In re* Charity Schools of St. Dunstan's-in-the-West. [537

COSTS UNDER LANDS CLAUSES ACT—*Railway Company—Money deposited under s. 85—Arrangement with Vendor—Costs of abortive Proceedings—Headings of Parts of the Act.*] Land was taken by a railway company under the *Lands Clauses Act*. The company, wishing to take possession, paid a sum of money into the bank under sect. 85 of the Act, and proceedings were taken to summon a jury, An agreement was then come to, fixing the price for the land, and the company agreed to pay all such costs, charges, and expenses as they were liable to pay under the *Lands Clauses Act*, or otherwise:—*Held*, that they were liable to pay the costs of the vendors in the proceedings to summon a jury. *Ex parte* Morris [418

COSTS UNDER RAILWAYS ABANDONMENT ACT, 1869 (32 & 33 *Vict. c.* 114, *s.* 5)—*Winding-up—Costs of Petition for Transfer of Deposit Moneys.*] A railway having been abandoned under the *Railways Abandonment Act*, the costs of a Petition by the depositor for the transfer out to him of the bulk of the deposit moneys were ordered to be paid out of the general assets of the company. *In re* Laugharne Railway Company - - - - - - 454

COVENANT—Further assurance—Specialty debt *See* Specialty Debt. 2. [154

—— Rent and repairs—Arrears after death covenantor—Specialty debt - 89
See Specialty Debt. 1.

CREDITOR—Petition by—Right to dismiss—Costs *See* Winding-up Petition. 2. [59

—— Petition by—Wishes of majority - 26
See Winding-up Petition. 1.

CREDITOR'S DEED—Opening accounts—Jurisdiction of Chancery - - 64
See Bankruptcy Jurisdiction.

CUMULATIVE GIFTS — *Will — Two Codicils — Repetition of Legacies.*] Where, after a legacy has been given by one instrument, a legacy of equal, greater, or less amount is given to the same legatee by another instrument, they are *primâ facie* cumulative.—Consideration of the indications of intention required to rebut this construction. Wilson *v.* O'Leary - - - 525

CY-PRÈS—*Charitable Gift—Insufficient Description—Intention to benefit a particular Object—Division between two Societies—Evidence of surrounding Circumstances.*] Where in a gift to a charity the object of the gift is imperfectly described and uncertainty as to it in consequence arises, evidence of the donor having been interested in or a subscriber to any particular society is admissible to shew what was in her mind when making the gift.—A testatrix gave a legacy to "the treasurer for the time being of the fund for the

CY-PRÈS—*continued.*

relief of the widows and orphans of the clergy in the diocese of *Worcester*." At the date of the will there was no society so named, but there was a society which had formerly fulfilled that office for the diocese, but had lately been restricted, both in name and in its operations, to the archdeaconry of *Worcester*. The testatrix and her family had subscribed to this society in both its conditions. There was also a similar society, with which the testatrix had not been connected, in the archdeaconry of *Coventry*, which formed the rest of the diocese:—*Held*, that the testatrix must be presumed to have given the legacy to the *Worcester* society in the belief that it extended to the whole diocese, and it must be considered as a gift to an object, not to a society, and the legacy must be divided between the societies. *In re* Kelvert's Trusts - - - - - - 183

DEATH—Gift on, coupled with words of contingency - - - - 302
See Death coupled with a Contingency.

—— Plaintiff in suit—Revivor - - 198
See Revivor and Supplement.

DEATH COUPLED WITH A CONTINGENCY—*Will—Construction—Tenant for Life—Residuary Bequest—Period of Distribution—Survivorship—Death, leaving Issue—When contingency to be determined.*] Testator gave a sum of stock to trustees, upon trust to pay the dividends to his wife during her life or widowhood; but should she marry again, he directed that the dividends should "cease," and fall into his residue. Afterwards, "as to the rest, residue, and remainder" of his estate and effects, he gave and disposed thereof to his four sons, naming them, "with benefit of survivorship, unless they shall die leaving issue; and then my meaning is, that the said property shall go to his or their issue, and to be paid to them at their respectively attaining the age of twenty-one years":—*Held*, that the disposition of the sum of stock, after the death of the tenant for life, was reversionary, and not like that of the rest of the residue, immediate; and that the proviso, "with benefit of survivorship," followed by the condition "unless they shall die leaving issue," must be referred as to the same sum of stock to survivorship and death leaving issue in the lifetime of the tenant for life, and not generally; and hence that the sons who survived the tenant for life took absolute interests, though they had issue living. *In re* Hill's Trusts 302

DECREE—Foreclosure suit—Priority of incumbrance - - - - 395
See Foreclosure Suit. 1.

—— Service of - - - - 152
See Service of Decree.

DEPOSIT OF DEEDS—Building society - 516
See Building Society.

DIRECTORS—Breach of trust by—Recovery of fund *See* Breach of Trust by Directors. [386

—— Powers of—Informal letter - - 246
See Powers of Directors.

DISCLAIMER—Trusts of will—Legal estate 309
See Administration with Will annexed

DISCRETION—Judge—Winding-up Petition 26
See Winding-up Petition. 1.

DISMISSAL FOR WANT OF PROSECUTION—*Practice—Amendment—Motion to restore.*] After the expiration of the fourteen days within which to file replication, limited by the usual order to speed, Plaintiff moved to restore the bill, on the ground that he, by a mere slip, had not asked that the order to speed should include the alternative of amending his bill (in which case, by the intervention of a vacation, the time would not have been run out). The application was refused. Burkinshaw *v.* Wilson - - - 103

DISTRESS—Colliery—Royalty secured by 472
See Sale by Liquidator.

DOMICIL—Foreign—Legacy duty - - 464
See Legacy Duty.

—— Original—Intention to change civil status 617
See Domicil of Origin. 2.

—— Original—Refusal to take out letters of naturalisation - - - 298
See Domicil of Origin. 1.

DOMICIL OF ORIGIN—A French subject, by establishing himself in business in this country, marrying, and continuing to reside here for more than thirty years, making only occasional visits to *France*:—*Held*, to have lost his domicil of origin, and acquired an English domicil, notwithstanding his refusal to take out letters of naturalisation in this country, on the ground that he might return to *France*, and would not give up his *status* as a French citizen. Brunel *v.* Brunel - 298

2. —— *Intention to change Civil Status.*] *Robert*, son of a domiciled Scotchman, who, in 1792, at the age of eighteen, entered the Home Office (*London*), where he remained till 1802, when he resigned his office, having married an English lady of fortune, and after residing for some time in several hired houses in *England*, finally settled and died in his family mansion house in *Scotland*, which, with part of the family estate, he had purchased with his wife's money from his father's trustees:—*Held*, that he had not lost his domicil of origin. The testator, son of *Robert*, was born in 1803, during a visit his parents made to *London*, and from the age of thirteen resided with his parents in *Scotland*, paying occasional visits to *England*, till his mother's death in 1857, after which he let for short terms his family estate, and making occasional visits to *Scotland*, resided chiefly in hired houses in *England*, where he cohabited with an Englishwoman, whom, after the birth of his first child, he married, and for whom, by an English will, he made a provision, including a residence in *England* to be used after his decease; and having in the Scotch form disponed of his Scotch real estate to his nephew, died in *England*, where he was buried in a grave he had purchased for the interment of his step-brother:—*Held*, that his domicil was Scotch.—The intention required to effect a change of domicil (as distinguished from the acts embodying it) is an intention to settle in a new country as a permanent home, and this is sufficient without any intention to change civil status, and, *semble*, even though an intention to retain the old civil status be proved.—*Donaldson* v. *M'Clure* (20 Court of Sess. Cas. (2nd Series), 307); *Moorhouse* v. *Lord* (10 H. L. C. 272); *Attorney-General* v. *Countess de Wahlstatt* (3 H. & C. 374); *Udny* v. *Udny* (Law Rep. 1 H. L., Sc. 441); *Haldane* v. *Eckford* (Law Rep. 8 Eq. 631); *Aitchison* v. *Dixon* (Law Rep. 10 Eq. 589) discussed. Douglas *v.* Douglas. Douglas *v.* Webster - - - - - 617

DOMICIL OF ORIGIN—*continued.*

ELECTION, DOCTRINE OF—*Pleading—Suit to ascertain Value with a view to Elect.*] Consideration of the circumstances under which a person, who is put to election, may file a bill to have the value of the property, subject to the election, ascertained. Discussion of *Butricke* v. *Broadhurst* (1 Ves. 171) and of Mr. *Swanston's* note in *Dillon* v. *Parker* (1 Sw. 381, n.). Douglas *v.* Douglas. Douglas *v.* Webster - - - - 617

EQUITY OF REDEMPTION—Wife's rent-charge —Reconveyance to husband - 553
See Mortgage by Husband and Wife.

EQUITY TO A SETTLEMENT—*Husband and Wife—Income of Chattels real—Particular Assignee of Husband.*] A wife has no equity to a settlement out of arrears of past income of real or leasehold property which the husband has assigned to a particular assignee.—A husband and wife signed a memorandum charging leasehold property of the wife with the repayment of a debt of the husband. The income was paid to the assignee under the memorandum till the bankruptcy of the husband, after which it was retained and accumulated, and the accumulations were paid into Court:—*Held*, that the fund in Court, having arisen from arrears of income which the husband or his assignee was entitled to receive as it arose, was not, as against a particular assignee of the husband, liable to any equity to a settlement on the part of the wife. *In re* Carr's Trusts 609

EVIDENCE—Parol—Mortgage of wife's property [553
See Mortgage by Husband and Wife.

—— Parol, to explain will—Ambiguous description of charity - - - 183
See Cy-près.

—— Solvency—Burden of proof—Voluntary settlement - - - - 158
See Fraudulent Conveyance.

EXAMINATION OF MARRIED WOMAN—Dispensed with - - - - 199
See Settled Estates Act. 2.

EXECUTOR—Account with bankers - 98
See Bankers' Account.

—— Beneficial interest in residue - - 444
See Mortmain. 2.

—— Right of retainer - - - 570
See Retainer by Executor.

EXECUTION CREDITOR—*Company—Proceedings after commencement of Winding-up—Execution "put in force"—Writ in Sheriff's hands, but Possession not taken before Winding-up—25 & 26 Vict. c. 89, ss. 87, 163.*] A creditor, having obtained judgment in an action against a company, placed the writ of execution in the hands of the sheriff three hours before a petition was presented for winding up the company, but possession of the property was not taken by the sheriff until three hours after the presentation of the petition:—*Held*, that execution was not "put in force" within the meaning of the 163rd section of the *Companies Act*, 1862, until possession was actually taken; and that as it appeared that the debt of the creditor was already secured by a guarantee

EXECUTION CREDITOR—*continued.*

of the directors, and the object of the winding-up was to secure a *bonâ fide* distribution equally among all the creditors, there were no grounds for the exercise of the discretion given to the Court by the 87th section of the Act, and a motion to stay the proceedings under the writ of execution was acceded to. *In re* London and Devon Biscuit Company - - - 190

2. —— *Bankruptcy Act*, 1869, *ss.* 13, 65, 72, 126—*Jurisdiction—Composition with Creditors—Injunction.*] On the 9th of November, 1870, judgment was obtained in an action against *E.*, and on the 15th of November execution was levied by the sheriff under a writ of *fi. fa.* On the 17th of November a petition for liquidation by arrangement with his creditors, under sect. 125 of the *Bankruptcy Act*, 1869, was presented by *E.*, and on the 19th an injunction restraining further proceedings in the execution was granted. On the 20th of January, 1871, the creditors held a statutory meeting, and passed a resolution, which was afterwards duly confirmed and registered, to accept a composition. After this *E.* brought an action for trespass against the sheriff for retaining possession of the goods seized, and at the same time the execution creditor ruled the sheriff to return the writ of *fi. fa.* which had been directed to him. Under these circumstances, the sheriff applied to the Court to restrain the proceedings against him, and for protection and directions:—*Held*, that the Court of Bankruptcy had jurisdiction; that the execution was good against the estate of *E.*, notwithstanding the resolution for composition; and order made restraining the action which had been brought by *E. Ex parte* Sheriff of Middlesex. *In re* England **207**

EXECUTORY SETTLEMENT—*Joint Tenancy—Effect of surrounding Circumstances.*] *B.*, in 1842, transferred to three persons a debenture, without any declaration of trust other than an expression in a letter written by him to his solicitor shortly before the transfer, in which the three persons were named as trustees, and the trusts of a proposed settlement of the debenture were stated to be "for my niece Mrs. *C. M.* and her children"; —*Held*, that a valid trust was declared by the letter in favour of *C. M.* for life, and afterwards of her children as joint tenants.—The transferees of the debenture were already trustees of a will, which contained limitations for the benefit not only of Mrs. *C. M.* and her children, but of the issue of deceased children, and from contemporaneous entries in a solicitor's book it appeared that, after the date of the letter, *B.* said he had made up his mind to transfer to the same three persons, "without stating any trust or condition;" also that *B.* was advised to take a letter from them that they held the debenture upon the same trusts as the will; but no trace of any such letter appeared.—The trustees paid the income to Mrs. *C. M.* during her life, and upon her death transferred the fund into Court. There were issue of deceased children of *C. M.*:—*Held*, that a trust for the issue of the deceased children had not been sufficiently declared. *In re* Bellasis' Trust **218**

2. —— *Will—Shifting Clause upon Accession to Dignity—Vesting of Portions not to be postponed until Death of Person exercising the Power—Jointures not to fail.*] Testatrix, by will dated in 1860, devised freeholds to the use of trustees and their heirs, upon trust for *E.* for life, remainder to the use of *C.*, the first son of *E.*, for life, without impeachment of waste, remainder to the use of his first and other sons successively in tail male; with remainders in like form to the use of the third (passing over the second), fourth, and other younger sons of *E.* for life, and their respective first and other sons in tail male, with divers remainders over. The settlement contained powers to the sons of *E.* thereinbefore named of jointuring and of charging portions.—By letters patent, dated in April, 1864, the barony of *B.* was conferred upon *E.* for life; and after her death, upon *R.*, the second son of *E.*, and the heirs male of his body; and in default of such issue, to the third, fourth, and fifth sons of *E.*, and the heirs male of their bodies respectively. The letters patent contained a proviso, that if any person taking thereunder should succeed to the earldom of *D.*, and there should then or thereafter be a younger son, or heir male of a younger son, then the succession to the barony should devolve upon the son of *E.*, or the heir who would be next entitled to the barony.—Testatrix, by a codicil, dated in May, 1864, revoked the devise contained in her will, and in lieu thereof devised the freeholds to trustees, upon trust, as soon as conveniently might be after her decease, to "convey, settle, and assure" the same "in a course of entail, to correspond as nearly as may be with the limitations" of the barony, "and the provisoes affecting the same contained in the letters patent," . . . and with all such "powers, provisoes, declarations, and agreements" as the trustees should consider proper, or as their counsel should advise.—*E.* died; and the House of Lords having declared (Law Rep. 4 H. L. 543, 579) that the estates devised by the codicil ought to be limited in strict settlement to *R.* and the younger sons of *E.* for their respective lives, without impeachment of waste, with remainder to their first and other sons in tail male; that such settlement ought to contain powers of jointuring and charging portions for younger children to the limits contained in the will; and that in the settlement there ought to be inserted a shifting clause in the words of the letters patent:—*Held*, that the settlement ought not to contain a clause postponing the vesting of portions until the death of the persons creating them:—*Held*, also, that the settlement ought not to contain a proviso avoiding jointures and portions in the event of the estates shifting on the accession of the earldom. Viscount Holmesdale *v.* West **280**

3. —— *Will—Construction—Executory Trust.*] Testator, by his will, directed his property to be divided into nine shares, and gave one and a half share to each of his two daughters, "to be settled on themselves at their marriage." At his death the two daughters were infants.—The two daughters having attained twenty-one, and being unmarried:—*Held*, that they were entitled to their shares absolutely, and that there was no trust for a settlement which the Court could execute. Magrath *v.* Morehead - - **491**

EXONERATION OF PERSONALTY—*Specific Bequest of Personalty—Devise of Real Estate to pay Debts—Contribution for Debts.*] A testator bequeathed all his household goods and furniture, farming stock, money, goods, chattels, and effects, and all other his personal estate, to his wife absolutely; he then devised a freehold estate, called the *Rye Crofts*, for sale and payment of debts, and the surplus to his wife; and he devised another freehold estate to his wife absolutely; and other estates to his wife for life, with remainders over. The *Rye Crofts* estate was insufficient for payment of debts:—*Held*, that the bequest of personalty to the wife was specific, and that such bequest and the specifically devised real estates must contribute rateably to the payment of the suplus debts for which the *Rye Crofts* estate was insufficient. Powell *v.* Riley 175

FLUCTUATING DEBT—Security for - 540
See Apportionment of Mortgage.

FORECLOSURE SUIT—*Mortgage—Priorities of Incumbrances—Form of Decree—Interest of Mortgagor vested in the Crown.*] In a foreclosure suit, when questions as to priorities not affecting the Plaintiff are raised between co-Defendants, the Court will fix a day certain for all to redeem or be foreclosed, without prejudice to the rights of the several Defendants *inter se*.—In such a suit, where part of the mortgagor's interest is vested in the Crown, the Court will not decree foreclosure in respect thereof, but will give the Plaintiff liberty to apply in Chambers for a sale.—Form of decree. Bartlett *v.* Rees - - - 395

2. —— *Sale by Plaintiff confirmed with Defendant's Consent—Costs of Plaintiff in priority to Defendant.*] Legal mortgagees having filed a bill for foreclosure only, amended their bill by stating that they had, with the Defendant's consent, contracted to sell the property, and prayed that the purchase might be carried out under the sanction of the Court. By a consent decree, the Court ordered the sale to be carried out. The purchase-money being sufficient only to pay the principal and interest with a small balance over:—*Held*, that the Plaintiffs were entitled to their costs of suit so far as the fund would go, before the Defendants were paid any costs.—Observations on *Macrae* v. *Ellerton* (6 W. R. 851; 4 Jur. (N.S.) 967.) Cook *v.* Hart - - - 459

FORFEITURE—Marriage with infant—4 Geo. 4, c. 76, s. 23 - - - 32, 38
See Settlement by the Court. 1, 2.

FRAUD—Sale at undervalue - - 320
See Sale at Undervalue.

—— Solicitor—Liability of trustee - 373
See Investment of Trustees.

FRAUDULENT CONVEYANCE—*Voluntary Settlement—Settlor engaged in Speculative Transactions—Burden of proving Solvency—Debt incurred after Settlement — Damages recovered in Action.*] A settlor, at the time of making a voluntary settlement, made a statement of his assets and liabilities, shewing a balance in his favour. He was incurring heavy liabilities as managing director of a company, and from transactions on the *Stock Exchange*. Nine months after the date of the settlement he called a meeting of his creditors, and laid before them a statement shewing himself to be insolvent, and subsequently he became bankrupt:—*Held*, that the burden was upon him to shew solvency at the date of the settlement.—*Semble*, that damages recovered in an action commenced after the settlement for inducing the Plaintiff to become a member of a company by false and fraudulent misrepresentations made previously to the settlement must be taken into consideration in estimating the settlor's solvency at the date of the settlement. Crossley *v.* Elworthy - - - - - 158

FRAUDULENT PREFERENCE—*Bankruptcy Act*, 1869, *s.* 92—*Payee receiving in good faith.*] Payment a few days before stopping payment, and less than three months before bankruptcy, by an agent to his principal of a sum of money payable in the ordinary course of business, without any intention to prefer such creditor being proved:—*Held*, not a fraudulent preference within the meaning of the 92nd section of the *Bankruptcy Act*, 1869.—A creditor receiving payment of a sum due to him without any knowledge of the insolvent condition of the debtor's affairs, is within the exception contained in the last part of the same section. *Ex parte* Blackburn. *In re* Cheesebrough - - - - 358

FUTURE HUSBAND—*Will—Trust—Gift to unmarried Daughters for Life—Gift to Daughter's Husband, whether limited to present Husband—Title—Specific Performance.*] Testator gave his estates, and the rents thereof, upon trust for his two daughters *A.* and *L.*, to receive the same equally as tenants in common for their lives, independent of the control of any husband or husbands with whom they might intermarry; and after the decease of his daughters, he directed that the trustees should stand seised of the estates, and convey the whole thereof unto the respective husbands of his daughters, provided that if either daughter should die unmarried the share of such daughter should accrue and belong to the survivor for life, and on her decease the whole should devolve to and be conveyed to her husband. *A.* died leaving a husband surviving. *L.* married *P.*, who by will gave to his wife all the estate to which he was entitled under the will of her father absolutely. *P.* died leaving his wife surviving. The Defendant at an auction purchased three lots of the estates, but refused to complete on the ground that *P.* was not entitled to an absolute interest in remainder on the death of *L.* On demurrer to a bill for specific performance:—*Held*, that, if *L.* should leave a husband surviving, his claim to the estate would be a good one, and that the title of *L.* was not such as could be forced on a purchaser.—Demurrer allowed. Radford *v.* Willis - - 105

GENERAL SHIP—*Ship—Charterparty—Lien for Dead Freight—Advertisement of Vessel as—Notice.*] Where a vessel about to sail is advertised as a general ship, an intending shipper is not bound to inquire as to the existence of any charterparty. A person who, without notice of any charterparty, has placed goods on board a vessel which has been advertised as a general ship, is entitled to have his goods returned to him if the captain refuses to sign bills of lading except subject to a charter-

GENERAL SHIP—*continued.*
party containing objectionable provisions. A Norwegian vessel was advertised as a general ship by Messrs. *C. & Co.*, an English firm, described in the advertisement as brokers. The Plaintiffs entered into an agreement with Messrs. *C. & Co.* for the carriage of certain goods at a stipulated rate of freight, and placed the goods on board before they had notice of any charterparty affecting the ship. It afterwards proved that Messrs. *C. & Co.* were charterers of the vessel under a charterparty, which provided that the owner should have a lien for freight, dead freight, and demurrage. The captain refused to sign bills of lading, except subject to the charterparty, or to return the goods to the Plaintiffs;—*Held*, that the owners of the ship were not entitled to retain the goods in satisfaction of their claims under the charterparty, and that the Plaintiffs were entitled to have the goods delivered to them free from any claim by the owners. Peek *v.* Larsen - 378

GIFT IN SUCCESSION OR TO A CLASS—*Will—Gift to "every Son during his Life"—Tenants in Common—Cross Remainders.*] Testator directed his trustees to purchase lands in the counties of *N.* and *D.*, to be settled, on the death of the eldest son of *J. S.* without issue (which happened), to the use of every son of *J. S.* then living or who should be born in testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his decease to the use of such son's first and every other son successively in tail male, and on failure of such issue, to the use of the testator's right heirs:—*Held*, that the younger sons of *J. S.* took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross remainders over. Surtees *v.* Surtees 400

GIFT TO CHILDREN AT TWENTY-ONE—*Class ascertained upon eldest attaining Twenty-one.*] A testatrix gave the residue of her personal estate to trustees, to divide the same equally among such of her grandchildren as should attain the age of twenty-one, with power to apply the interest of the presumptive shares of such grandchildren towards their maintenance and education:—*Held*, that those grandchildren only were entitled to a share of the property who were alive when the eldest attained twenty-one, and that afterborn children were excluded.—*Bateman* v. *Gray* (Law Rep. 6 Eq. 215), and *Iredell* v. *Iredell* (25 Beav. 485), observed upon. Gimblett *v.* Purton 427

GIFT TO WIFE AND CHILDREN—*Will—Construction—Life Estate implied in the Mother, with Remainder to Children.*] A testator gave £1400 to trustees in trust to pay the income to *M.* for life, and the capital to her children (excluding her two eldest sons) who should survive her and attain twenty-one. She also gave £1500 to each of her two eldest sons, and the residue to *M.* and such of her children, including the two eldest sons, as should attain twenty-one:—*Held*, that *M.* took a life estate in the residue, with remainder to such of her children as should attain twenty-one. *In re* Owen's Trusts - - - 316

2. —— *Will.*] A testator gave and bequeathed all his real and personal estate to his wife for the use and benefit of herself and of all his children, whether born of his former wife or such as might be born of his then present wife:—*Held*, that the wife was entitled to an estate for life, with remainder to the children as joint tenants. Newill *v.* Newill - - - - - 432

GRANT—Right of way - - - 366
See Carriageway or Footway.

GUARDIAN—Scotch curator—Payment of assets into English Court - - — 319
See Scotch Curator Bonis.

HUSBAND AND WIFE—Equity to settlement—Income of wife's leaseholds - 609
See Equity to Settlement.
—— Examination of married woman - 199
See Settled Estates Act. 2.
—— Infant, marriage with—4 Geo. 4, c. 76, s. 23 [32, 38
See Settlement by the Court. 1, 2.
—— Mortgage of wife's property - - 553
See Mortgage by Husband and Wife.
—— Present or future husband—Gift to - 105
See Future Husband.
—— Separate estate—Charge for solicitor's costs
See Solicitor's Lien. [115
—— Settlement by Court of Chancery 32, 38
See Settlement by the Court. 1, 2.

ILLEGITIMATE CHILDREN — *Will — Gift to Child or Children of C.*] Testator, after giving a share of his property by his will upon trust for his niece *B.* and her husband, and for her child, if only one, or all her children, if more than one, gave another share upon such trusts in favour of his niece *C.* and her husband, and her child or children, as should correspond with the preceding trusts in favour of *B.*—*C.* had only one child, born before her marriage, and illegitimate. She was fifty years old at the date of the will, and fifty-seven years old at the date of a subsequent codicil:—*Held*, that, on the death of *C.*, her illegitimate child was not entitled. Paul *v.* Children [16

IMPLICATION—Gift to wife and children 316
See Gift to Wife and Children. 1.

INCOME AND CORPUS—Costs of trustees 111
See Costs of Trustee.

INDEFEASIBLE TITLE—Mortgage - 398
See Land Registry Act.

INFANT — Jurisdiction to bind interest of — Mortgage to rebuild mansion - 169
See Mortgage to rebuild Mansion.
—— Marriage with—Form of settlement by Court of Chancery - - - 32, 38
See Settlement by the Court. 1, 2.
—— Scotch curator—English administration
See Scotch Curator Bonis. [319

INFORMATION—Costs of proceedings before the Attorney-General - - - 262
See Costs in the Cause.

INJUNCTION—Bankruptcy—Sale by liquidators
See Injunction in Bankruptcy. [137
—— Bankruptcy—Action against sheriff - 207
See Execution Creditor. 2.

INJUNCTION—*continued.*
—— Bankruptcy—Sequestration in Chancery suit *See* INJUNCTION IN BANKRUPTCY. [137
—— Execution against company - - 190 *See* EXECUTION CREDITOR. 1.
—— Trade-mark—Innocent infringement - 140 *See* TRADE-MARK.

INJUNCTION IN BANKRUPTCY — *Bankruptcy Act*, 1869, *ss.* 12, 13, 15—*Sequestration under an Order of the Court of Chancery—Jurisdiction.*] A sequestration in a Chancery suit is a "legal process" within the meaning of the 13th section of the *Bankruptcy Act*, 1869. Where the usual order directing a sale by the sequestrators had been made by the Court of Chancery, and the owner of the property was adjudicated bankrupt before the sale:—*Held*, that the Court of Bankruptcy had jurisdiction to restrain the sale. *Ex parte* HUGHES. *In re* BROWNE - - - - - 137

INSOLVENCY—Proof of—Voluntary settlement *See* FRAUDULENT CONVEYANCE. [158

INTEREST—Bond—Arrears after obligor's death *See* SPECIALTY DEBT. 1. [89
—— Payment of—Statute of Limitations—Mortgage - - - - - 41 *See* LIMITATIONS, STATUTE OF. 1.

INVESTMENT—Purchase-money under Settled Estates Act - - - - 12 *See* SETTLED ESTATES ACT. 1.
—— Personalty in land—Rebuilding parsonage *See* INVESTMENT IN LAND. [77
—— Trust fund—Insufficient security - 373 *See* INVESTMENT BY TRUSTEES.

INVESTMENT BY TRUSTEES—*Trustee—Loss of Trust Fund—Investment on Mortgage—Fraud of Solicitor—Liability of Trustee.*] *Semble*, a trustee is liable for the loss of a trust fund caused by his solicitor having committed a fraud on the occasion of the investment of the fund on mortgage.—Upon the occasion of the investment of a trust fund on mortgage, the trustee employed the same solicitor as the mortgagor. Subsequently he had reason to suspect the sufficiency of the security, but took no steps to inquire into the matter. It afterwards turned out that the solicitor had practised a fraud on the trustee, and that the security was insufficient:—*Held*, that the trustee was liable for the loss occasioned to the trust estate. SUTTON *v.* WILDERS - - - - - - 373

INVESTMENT IN LAND—*Trustees—Petition for Advice of Court—Trust to lay out Personalty in Land—Expenditure on Estate—Rebuilding Parsonage.*] *H.*, by his will, directed his trustees to lay out his residuary personalty in the purchase of land to go along with certain settled property. The settled property comprised an advowson, of which the parsonage-house was, at the testator's death, in a ruinous state, and he was about to rebuild it:—*Held*, that the trustees might properly lay out part of the residuary personalty in rebuilding the house. *In re* LORD HOTHAM'S TRUSTS 76

JOINT TENANTS—Gift to *A.* and her children [433 *See* GIFT TO WIFE AND CHILDREN. 2.
—— Wife and children—Executory settlement *See* EXECUTORY SETTLEMENT. 1. [218

JOINT AND SEPARATE DEBTS — *Partnership Debts—Separate Debts of one Partner—Set-off by Debtor—Jurisdiction in Equity—Money Demand.*] *A.* and *B.* were partners in a firm. *A.* allowed a debtor to the partnership to set off a separate debt of his own against money due to the firm, the debtor knowing the interest which *B.* had in the debt. *B.* filed a bill against the debtor and against *A.* to have it declared that the debtor had no right to retain his share in the debt towards payment of the separate debt of *A.*:—*Held*, upon demurrer, that, although one partner could bind another in the receipt and payment of partnership debts, he could not set off his separate debts against the debts due to the firm; and the debtor's knowledge of the co-partner's interest rendered the bill sustainable as against him: *Held*, also, that this was a proper subject for a suit in equity, since one partner must sue in an action at law in the name of himself and his co-partner. PIERCY *v.* FYNNEY [69

JURISDICTION—Chancery—Opening accounts of composition deed - - - 64 *See* BANKRUPTCY JURISDICTION.
—— Chancery—Appointment of new trustee in Bankruptcy - - - - 61 *See* TRUSTEE ACT. 1.
—— Chancery — Infant — Mortgage to rebuild mansion. - - - - 169 *See* MORTGAGE TO REBUILD MANSION.
—— Chancery — Partnership debts — Set off of separate debt of one partner - 69 *See* JOINT AND SEPARATE DEBTS.
—— Mining lease—Bill for account - 408 *See* MINING LEASE.
—— Winding-up — Company with shareholders and no debts - - - 188 *See* WINDING-UP PETITION. 3.

LACHES — Allotment of shares to directors for distribution—Abandonment - 268 *See* ABANDONMENT OF SHARES.
—— Contributory — Misrepresentation in prospectus - - - - 331 *See* MISREPRESENTATION IN PROSPECTUS.

LAND REGISTRY ACT (25 & 26 *Vict. c.* 53, *s.* 17) —*Indefeasible Title—Mortgagor with Indefeasible Title—Purchaser from Mortgagee.*] A mortgagor registered with an indefeasible title made three successive mortgages, all of which were entered on the register of incumbrances; the first mortgagee sold under his power of sale, and conveyed the estate to a purchaser:—*Held*, that the purchaser was entitled to be registered with an indefeasible title, although the second and third mortgages remained on the register of incumbrances. *In re* RICHARDSON - - - - - 398

LANDLORD AND TENANT—Rent—Arrears after death of tenant - - - 89 *See* SPECIALTY DEBT. 1.

LANDS CLAUSES ACT—Compensation—Dealings after notice to treat - - 389 *See* COMPENSATION UNDER LANDS CLAUSES ACT.
—— Costs under - - - - 418 *See* COSTS UNDER LANDS CLAUSES ACT.

LEASE—Mine—Equitable lessee—Account 408 *See* MINING LEASE.

LEASES AND SALES OF SETTLED ESTATES ACT [12, 199
See Settled Estates Act. 1, 2.

LEAVE TO PROCEED AFTER WINDING-UP—Execution in hands of sheriff - 190
See Execution Creditor. 1.

"LEAVING ISSUE" - - - - 302
See Death coupled with a Contingency.

LEGACY—Repetition of - - - 525
See Cumulative Gifts.

—— Specific—Whole of personal estate - 175
See Exoneration of Personalty.

LEGACY DUTY—*Annuity for Lives charged on Land in England—Foreign Domicil—Will—Bequest of Share in the Annuity.*] Legacy duty is not payable on a share bequeathed by the will of a person domiciled in a foreign country in an annuity for lives charged on English lands. Chatfield *v.* Berchtoldt - - - - 464

LEGAL ESTATE—Disclaimer by trustees—Leaseholds - - - - - 309
See Administration with Will annexed.

—— Priority—Reversionary term - - 78
See Priority by Legal Estate.

LEGALITY—Rules of building society - 516
See Building Society.

LEGATEE—Debtor to testator—Proof in Bankruptcy—Satisfaction of debt - 614
See Receiver.

LETTER OF CREDIT—*Proof in Winding-up — Contract of Indemnity—Bills of Exchange.*] Bills of exchange were accepted by the *A. Company* for the accommodation of *B. Company*, upon an agreement that funds should be provided by *B. Company* to meet the bills at maturity. The bills were discounted, but before they arrived at maturity companies *A.* and *B.* had both stopped payment, and the bills were dishonoured. *C.*, the holder of the bills for value, recovered the amount due upon them by proofs against companies *A.* and *B.* under their respective windings-up:—*Held*, that *A. Company* was entitled, under the contract of indemnity, to stand as a creditor against *B. Company* for the amount that had been recovered from them by *C.* as holder of the bills. *In re* Oriental Commercial Bank - - 501

LIABILITY—Trustees—Loss of funds - 373
See Investment by Trustees.

LIEN—Freight—General ship - - 378
See General Ship.

—— Solicitor—Charge for Costs - - 115
See Solicitor's Lien.

LIMITATIONS, STATUTE OF — *Mortgage — Covenant for Payment — Suit against Devisees — Statutes of Limitation—3 & 4 Will. 4, c. 27—3 & 4 Will. 4, c. 42—Payment of Interest—Acknowledgment.*] In 1822 *A.* mortgaged part of his *V.* estate and some renewable leaseholds to secure £1000, and the deed contained the usual covenant by *A.*, for himself, his heirs, executors, and administrators, for payment of principal and interest. *A.* died in 1825, having by his will devised to *B.*, his son, and *C.* his *X.* estate, in trust for his daughters *D.* and *E.* for life, with remainder (in the events which happened) to his other children, and the whole of his *V.* estate to the same trustees in trust for his daughter *F.* for life, with remainder to her children. The trustees were empowered to sell both estates, and apply the proceeds upon the trusts declared of the same; and the will contained a devise to the same trustees of his other real estates, the renewable leaseholds, and his personal estate, upon trust to sell and apply the proceeds in payment of legacies and the mortgages on *V.* and *X.* estates, and his other debts, the general residue being given to *B.* *B.* died in 1830, having by will given all his estate to his sisters *D.* and *E.*, and appointed them his executrixes. In 1831 mortgages affecting *X.* estate, and the part of *V.* estate not comprised in the mortgage of 1822, were paid off out of *A.'s* general estate, and reconveyances were executed to *C.* as surviving trustee of his will. *D.* received the rents of a moiety of *X.* estate, and paid interest on the mortgage of 1822 until her death in 1859. In 1864 *G.*, who had by representation become the surviving trustee of *A.'s* will, and as such, trustee for the persons beneficially interested, of the equity of redemption of the property comprised in the mortgage of 1822, sold the renewable leaseholds, and applied the purchase-money in discharging the arrears of interest due on that mortgage, and in satisfaction, *pro tanto*, of the principal. In a creditors' suit instituted in 1867 by the administrator of the transferee of the mortgage of 1822 for an account, sale of the mortgaged property, and, in case the money to arise by the sale should be insufficient, that the deficiency might be made good out of the assets of *A.*:—*Held*, that the claim was not barred by the *Statutes of Limitation* (3 & 4 Will. 4, c. 27; 3 & 4 Will. 4. c. 42), as, independently of the application of the proceeds of the sale in 1864 in satisfaction *pro tanto* of the debt and interest, the payment of interest by *D.* until her death in 1859 was binding upon all persons interested either in the mortgaged property or in the other property of *A.*, which was liable, by reason of the covenant, for repayment of interest, and kept the specialty alive against them. *Roddam* v. *Morley* (1 De G. & J. 1) approved, notwithstanding the observations upon it in *Coope* v. *Cresswell* (Law Rep. 2 Ch. 112). Pears *v.* Laing - - - - - 41

2. —— *Possessory Title—Possession of Agent—Adverse Possession—Wrongful Claimant—3 & 4 Will. 4, c. 27, s. 9.*] Possession of an agent is possession of the principal; and the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate. — A person claiming, without any real title, to be entitled to land is a person "wrongfully" claiming within the meaning of 3 & 4 Will. 4, c. 27, s. 9; and that section applies, although the claim may be put forward under a mistake, and without any improper intention to deprive others of their property. Williams *v.* Pott - - - - - - 149

LIQUIDATION BY ARRANGEMENT—Execution creditor - - - - 207
See Execution Creditor. 2.

LIQUIDATOR—Costs and charges, how payable
See Costs of Liquidation. [126

LOCAL AND PERSONAL ACT—Costs of payment out of Court - - - - 488
See Costs under Act of Parliament 1.

MAINTENANCE — *Voluntary Settlement — Trust for Maintenance—Accumulated Income—Right of Father who has maintained his Children to unapplied Fund for Maintenance.*] The doctrine that where there is a fund subject to a trust for the maintenance of children, and the children are maintained by their father without any resort to the fund, the father is entitled to be recouped out of the accumulated income, only applies where the trust for maintenance is contained in an antenuptial marriage settlement which has a basis of contract to support it.—Therefore, where a father provided a fund of which he made a voluntary settlement after marriage upon his wife and children, and created a discretionary trust for maintenance of the children out of the income of the fund, and afterwards maintained them himself without calling for any contribution from the income of the fund:—*Held*, that he, and consequently that his trustee in bankruptcy, was not entitled to receive any portion of the accumulations of the income which might have been so applied. *In re* Kerrison's Trusts - - - 422

2. —— *Administration—Intestacy—Claim by a Mother for Maintenance out of Son's Estate.*] Where a mother made advances to a son during his minority, and not with the intention of afterwards claiming as a creditor against his estate:—*Held*, that there was no debt due to her for maintenance during such minority:—*Held*, also, that to support a claim by a mother for maintenance during a period after the son attained majority, there must have been a contract; and as none had been shewn, the claim was disallowed. *In re* Cottrell's Estate. Joyce *v.* Cottrell - 566

MAJORITY OF CREDITORS—Wishes as to winding-up - - - - 26
See Winding-up Petition. 1.

MAJORITY OF SHAREHOLDERS 504, 509, n.
See Reconstruction of Company. 1, 2.

MINES — Lease — Decree for account against equitable lessee - - - 408
See Mining Lease.

MINERALS—Reservation of - - 86
See Confirmation of Sales Act.

MINING LEASE—*Jurisdiction—Decree for Account against Equitable Owner of Lease.*] The Plaintiff granted a lease or license to mine under certain lands to two persons as trustees for a mining company. The company repudiated the lease, and alleged that they were entitled to mine under the custom of the district independently of the lease, and proceeded to mine accordingly. The applicability of the custom to the particular lands was disputed by the Plaintiff. The Plaintiff filed his bill against the surviving trustee and the managing committee of the company, praying that the lease might be declared binding, not only at law on the trustee, but also in equity on the partners in the company, and that the trustee at law and the other Defendants in equity were bound by the covenants in the lease; the bill also prayed an account, and that the trustee or the company might be ordered to pay to the Plaintiff the royalty to which he was entitled under the lease, and an

MINING LEASE—*continued.*

injunction to restrain the working of the mine except in accordance with the lease:—*Held*, that the lease must be treated as binding in equity on the company, and decree made in accordance with the prayer against the company.—*Walters* v. *Northern Coal Company* (5 D. M. & G. 629) and *Cox* v. *Bishop* (8 D. M. & G. 815) considered. Wright *v.* Pitt - - - - 408

MINOR—Marriage with—4 Geo. 4, c. 76, s. 23 [32, 38
See Settlement by the Court. 1. 2.

MISREPRESENTATION—Value of estate - 320
See Sale at Undervalue.

MISREPRESENTATION IN PROSPECTUS—*Winding-up — Surrender of Shares — Contributory who had been by the Court of Appeal removed from List of Present Members placed on List of Past Members.*] *J. W.* was, in June, 1865, allotted ten shares in the *L. & M.* bank, a company registered on the 13th of April, 1865, under the *Companies Act*, 1862, and whose prospectus stated, but untruly, that 80,000 shares had been subscribed. A settling-day on the *Stock Eachange* having been refused, the directors, in September, 1865, entered into an arrangement to amalgamate with another company. *J. W.*, on the 6th of October, said that he should prefer having his deposit money back; and at a meeting of the shareholders on the 16th of October a resolution was passed that all persons to whom shares had been allotted and who had paid deposits were entitled to have their allotments cancelled and money returned. This was made known to *J. W.* on the 20th of October, and he thereupon signed a receipt for his deposit, which was returned to him by cheque dated the 2nd of November, and in the register of shareholders there was written opposite to his name, "Money returned and allotment cancelled." On the 6th of November it was, at another meeting, notice for which was given on the 20th of October, resolved that the bank should be wound up voluntarily, and this resolution was confirmed on the 22nd of November, and liquidators were appointed. *J. W.* did not, until after the 22nd of November, discover that there had been a misrepresentation in the prospectus. The voluntary winding-up was, in June, 1866, ordered to be continued under supervision of the Court. The 39th of the articles of association enabled the directors to accept a surrender of any shares. In November, 1867, on a summons by the liquidators, *J. W.* was placed on the "A" list of contributories as a present member, but on appeal he was removed, on the ground that the directors had a power to accept a surrender of shares, and that the so-called cancellation might be supported as tantamount to a surrender. The liquidators having exhausted the "A" list, subsequently placed *J. W.* on the "B" list of past members, and an application on his behalf to be removed was dismissed on the ground that he had not, before the winding-up proceedings commenced, elected to exercise his right to have his allotment cancelled in consequence of the misrepresentation in the prospectus. *In re* London and Mediterranean Bank. Wright's Case. - - - - 331

"MONEY"—*Will—"Moneys in the House and out of it"—Building Shares—Sum of Consols.*] Testa-

"MONEY"—*continued.*

tor, after commencing his will with the words "as for my worldly goods and chattels, I bequeath them as followeth," gave several pecuniary legacies, and, amongst the rest, to his daughter *S.*, a legacy of £3000. He also bequeathed to his daughter *S.* "all things in the house remaining . . . and all moneys both in the house and out of it," and made no express residuary bequest. He appointed an executor.—At the time of his death testator had moneys in his house, at his bankers, and at a savings bank. He had also due to him arrears of a superannuation allowance, and a sum for funeral expenses from a friendly society, as to all which there was no question. He had besides some shares in a building society, and a sum of consols standing in his own name:—*Held*, that the shares and stock did not pass under the bequest of "all moneys both in the house and out of it." Collins *v.* Collins - - - - - 455

MONEY DEMAND—Jurisdiction of—Partnership debt—Set off - - - 69
See Joint and Separate Debts.

MORTGAGE—Apportionment—Fluctuating debt—Primary and secondary security 540
See Apportionment of Mortgage Debt.

—— Building society—Deposit of deeds - 516
See Building Society.

—— Equitable—True owner—Bankruptcy 354
See Order and Disposition. 1.

—— Foreclosure—Form of decree—Priority 395
See Foreclosure Suit. 1.

—— Foreclosure suit - Costs - - 459
See Foreclosure Suit. 2.

—— Indefeasible title—Subsequent mortgages
See Land Registry Act. [398

—— Power of sale—Reservation of minerals—Confirmation of Sales Act - - 86
See Confirmation of Sales Act.

—— Priority—Acquisition of legal reversionary term - - - - - 78
See Priority by Legal Estate.

—— Rebuilding mansion—Infant - - 169
See Mortgage to rebuild Mansion.

—— Repayment—Vesting order—One of two mortgagees - - - - 392
See Trustee Act. 3.

—— Statute of Limitations—Payment of interest—Acknowledgment - - 41
See Limitations, Statute of. 1.

—— Wife's leaseholds—Equity to a settlement
See Equity to a Settlement. [609

—— Wife's rent-charge - - - 553
See Mortgage by Husband and Wife.

MORTGAGE BY HUSBAND AND WIFE—*Wife's Rent-charge—Mortgage—Reconveyance to Husband—Wife's Equity of Redemption—Title—Parol Evidence of Intention.*] A married woman was entitled for life, in the event of surviving her husband, to a rent-charge. She joined him in executing a mortgage of the estates upon which it was charged, and by the mortgage deed absolutely released and extinguished her rent-charge. A portion of the estates was reconveyed by the mortgagees to the husband released from the mortgage, and he afterwards remortgaged the same to other mortgagees, who under a power entered into a contract for sale. The title being objected to, on the ground that the rent-charge was still subsisting, the vendors produced parol evidence that the former mortgagees had stipulated with the solicitor of the mortgagor and his wife for the absolute release of the rent-charge:—*Held*, that where a wife joins in a mortgage deed, her equity of redemption is not released if there be no express contract on her part to do so, and that at any rate the title was too doubtful to be forced upon the purchasers. *In re* Betton's Trust Estates - - - - 553

MORTGAGE TO REBUILD MANSION—*Settled Estate—Jurisdiction of Court—Interest of Infants—Residential Property.*] A residential estate of small extent was settled in strict settlement upon the settlor, his wife, and family, and power was given to certain trustees, during the minority of any person entitled to the rents and profits, to rebuild or repair the mansion-house, and to pay for the cost out of the rents and profits; and they also had power, with the consent of the tenant for life, to lease the property for ninety-nine years. The value of the estate to the settlor and his family depended chiefly upon the residence. Since the death of the settlor, his widow being tenant for life in possession, the house had become ruinous from the foundation having given way, and could only be rendered habitable by rebuilding on a new site:—The Court, on bill filed by the widow, authorized the trustees to raise by mortgage of the settled property £5000 to be spent in rebuilding the residence, on being satisfied that the value of the estate, with the house, and subject to the mortgage, would not be less than if the house had been removed and the materials sold. Frith *v.* Cameron - 169

MORTMAIN—*Will—Endowment of future Church—9 Geo. 2, c. 36.*] Bequest of personal estate, upon trust, to be applied in aid of erecting or of endowing an additional church at *A.*—Neither at the date of the will, nor of the testatrix's death, was any such additional church in course of erection or in immediate contemplation:—*Held*, upon the construction of the will, that the bequest was limited to a church in existence or in course of erection at the time of the testatrix's death, and consequently did not take effect. Sinnett *v.* Herbert [201

2. —— *Impure Personalty—Charity empowered to take Money devised or bequeathed—Residuary Gift to Executors—Power to take Money and hold Land to specified Amount—Power to take Money secured on Mortgage.*] By a private Act of Parliament the *Indigent Blind School* was incorporated, and empowered to have, hold, receive, and retain any sums of money paid, given, devised, or bequeathed by any person for the charitable purposes in the Act mentioned; and also to purchase, take, or receive, and thenceforth hold and enjoy, any lands, tenements, and hereditaments, in the whole not exceeding two acres, without incurring any of the penalties or forfeitures of the Statutes of Mortmain. The surplus funds of the corporation were also permitted to be invested on mortgage, and the lands, when released or foreclosed, might be held by the corporation for a period not ex-

MORTMAIN—*continued.*

ceeding two years. The *Female Orphan Asylum* was incorporated by an Act containing a similar clause.—By another Act the *Deaf and Dumb Asylum* was rendered capable to obtain, acquire, hold, and retain, for the purposes of the institution, any moneys and other personal estate and property, including moneys secured by mortgage of, or charged upon, or to arise from the sale of any hereditaments; with a proviso that nothing therein contained should make valid any grant which would be void or impeachable under the 9 Geo. 2, c. 36:—*Held*, that bequests of debts secured to the testator's estate by equitable mortgage of leaseholds to these charities were void.—Gifts of residue to executors in trust, with equal legacies to the executors by name:—*Held*, not to pass a beneficial interest in undisposed-of residue, which came to the Crown. Chester *v.* Chester [444

3. —— *Contingent Gift—Rule of Construction.*] Bequest of £1000 to be applied towards building a church at *Newark*, near *Northgate*, in connection with the Established Church; but if it should not be commenced during testator's lifetime, or before two years after his death, or if not erected at *Northgate*, then the legacy not to be payable. Notice of the conditions to be given to the legatees:—*Held*, void.—To be valid, a charitable gift for building must refer to an existing site, or expressly exclude the application of the money in the purchase of land. Pratt *v.* Harvey - - - - - - 544

4. —— *Bequests to a Convent and to Sisters of Charity—Voluntary Associations—Charitable Institutions*—43 *Eliz. c.* 4—*Religious Services.*] Testatrix, a married woman, bequeathed the residue of all her property, consisting of impure and pure personalty belonging to her separate use, to be divided equally between four religious institutions, two of them being the Dominican convent at *C.*, an institution consisting of Roman Catholic females living together by mutual agreement in a state of celibacy, under a common superior, for the purpose of sanctifying their own souls by prayer and pious contemplation, and the Sisters of Charity of *St. Paul* at *S. O.*, an institution composed of Roman Catholic women living together by mutual consent, whose primary object was personal sanctification, and who, as a means thereto, employed themselves in the exercise of works of piety and charity in teaching the poor and nursing the sick; and directed that the payments should be made to the superior for the time being respectively:—*Held*, that the community of sisters at *S. O.* was a voluntary association and a charitable institution, and that the bequest to them was good as to the pure personalty:—*Held*, also, that the bequest to the Dominican convent at *C.* was neither within the letter nor the spirit of 43 Eliz. c. 4; that it was good both as to the pure and impure personalty; and that it was not void on the ground of perpetuity.—*Semble*, religious purposes are charitable only when religious services tend directly or indirectly towards the instruction or edification of the public. Cocks *v.* Manners - - 574

MOTION—To restore bill after dismissal - 103
See Dismissal for want of Prosecution.

MULTIFARIOUSNESS—*Executor and Trustee—Surviving Partner and Purchaser—Bill for Administration of Testator's Estate and of Partnership Affairs—Misjoinder of Subjects—Parties*—15 *&* 16 *Vict. c.* 86. *s.* 42, *rule* 9—*Demurrer.*] Three out of four of testator's children, residuary legatees (the fourth being out of the jurisdiction), filed a bill against their mother, the tenant for life, and their uncle (who had carried on business in partnership with their father), and who were executrix and executor and trustees of the will, alleging that the uncle had possessed himself of and employed the estate of the testator, and had occasioned great loss to it; that he had mismanaged the partnership business; that he intended to get in and to apply the outstanding debts to his own use, and that he had bought at a valuation a portion of the estate, but had not paid the purchase-money; and praying for accounts of the estate of the testator, and of what the uncle had, or but for his wilful default and neglect might have received; and that he might be charged with what was now due from him in all respects, and with all losses occasioned by his mismanagement; and for a receiver and for an injunction. A demurrer by the uncle for multifariousness and for want of parties was overruled. Pointon *v.* Pointon - - - - - 547

—— Bill against lessor and undertenant - 366
See Carriageway or Footway.

NATURALIZATION—Refusal to accept - 298
See Domicil of Origin. 1.

NOTICE—Charterparty lien for freight - 378
See General Ship.

—— Contract for sale - - - 13
See Sub-contract.

—— Insolvency—Payment in good faith 358
See Fraudulent Preference.

NOTICE TO TREAT—Dealings with property after notice—Compensation - - 389
See Compensation under Lands Clauses Act.

ORDER AND DISPOSITION—*Bankruptcy Act*, 1869, *s.* 15, *sub-s.* 5—*Things in Action—Shares in Joint Stock Gas Company—Equitable Mortgage—True Owner—Notice.*] Shares in a company are not things in action within sect. 15, subsect. 5 of the *Bankruptcy Act*, 1869.—A debtor, a trader, deposited with a bank the certificates of five shares in a gas company to secure the balance of his account current. The bank gave no notice to the company of the deposit thus made. The debtor became bankrupt, and the Registrar, acting for the County Court Judge, ordered the bank to deliver up the shares to the trustee:—*Held*, that the bank was the true owner of the shares to the extent of the mortgage, and that the order had been properly made. *Ex parte* Union Bank of Manchester. *In re* Jackson [354

2. —— *Bankruptcy—Bill of Sale executed before, but registered after, the filing of a Petition for Liquidation—Claim by Trustee—Apparent Possession.*] An agreement to give a bill of sale need not be registered under the *Bills of Sale Act* (17 & 18 Vict. c. 36).—Where a bill of sale was executed in July, 1870, in accordance with an

ORDER AND DISPOSITION—*continued.*
agreement made in October, 1868, and the grantor filed a petition for liquidation on the same day, but after the execution of the bill of sale, and the bill of sale was registered within twenty-one days: —*Held*, that the title of the holder of the bill of sale prevailed over that of the trustee.—Goods in the possession of a person at the time of his bankruptcy subject to a bill of sale which entitles him to possession until demand of debt and default, are not in his order and disposition.—*Ashton* v. *Blackshaw* (Law Rep. 9 Eq. 510) followed. *Ex parte* Homan. *In re* Broadbent - 598

PARENT AND CHILD—Maintenance by father—Right to be recouped - - 422
See Maintenance. 1.
—— Maintenance by mother—Right to be recouped - - - - 566
See Maintenance. 2.

PARSONAGE—Rebuilding—Trust to invest in land - - - - - 77
See Investment in Land.

PARTIES—Bill by annuitant against specific legatees - - - - 225
See Conditional Gift. 1.
—— *Cestuis que trust*—Administration suit 547
See Multifariousness.
—— Conveyance—Sale of colliery—Lenders with power of distress - - - 472
See Sale by Liquidator.
—— Directors of company—Suit to recover fund
See Breach of Trust by Directors. [386

PARTNERSHIP—Accounts—Bill for administration of estate - - - 547
See Multifariousness.
—— Accounts—Profits—Income and capital 586
See Partnership Accounts.
—— Joint and separate debts - - 69
See Joint and Separate Debts.

PARTNERSHIP ACCOUNTS—*Profits—Income—Capital—Practice.*] Partnership articles provided that meetings of the partners should be held, and the profits should be divided annually. The partners, when reduced to two—the testator being one of them—met and resolved that the accounts should be made up half-yearly, in March and September. The meetings of the partners were held very irregularly, but when they took place it was the practice of the partners to examine the accounts, and to pass a resolution disposing of the profits, and until the passing of such resolution the profits were not carried to the separate credits. The testator, who died in August, 1869, by will declared that from the day of his decease the annual income arising from his residuary personal estate should belong, in effect, to *A. B.* for life, and that for that purpose the clear profits arising from his partnership should be considered as annual income, and be paid to *A. B.* for life.—In December, 1869, at a meeting of the surviving partner and an executor of the testator they resolved that the profits for the year ending March, 1869, should be divided; and the testator's share was carried to the credit of his account under date 30th of September, 1869, and it was, in December, 1869, paid to his executors. At a meeting of the same two

PARTNERSHIP ACCOUNTS—*continued.*
persons in March, 1870, they ordered the profits for the half-year ending September, 1869, to be divided, and the testator's share was paid to his executors. In taking the account in Chambers a question arose whether these shares of the testator should be distinguished as capital or as income, and *A. B.* presented a petition, under the statute 15 & 16 Vict. c. 80, asking for the opinion of the Court:—*Held*, that the profits for the year ending March, 1869, were capital, and belonged to the testator's estate; and that the profits for the half-year ending September, 1869, were income, and belonged to *A. B.*—*Semble*, a petition in an administration suit, to obtain the opinion of the Court as to the principle on which the accounts ought to be taken, for the guidance of the Chief Clerk, is not irregular. Browne *v.* Collins - 586

PAST MEMBER — *Winding-up — Compromise with Transferee of Shares—Liability of past Holder of Shares—Principal and Surety.*] *H.* sold and transferred fifty shares in a company to *D.*, who, on the company being wound up within a year after the transfer, was placed on the list of contributories.—The liquidator, with the sanction of the Court, entered into a compromise with *D.*, and, on payment of half the amount due for calls, released him from liability without any reservation of rights against third parties, and placed *H.* on the "B list" of contributories for the amount remaining due on the same shares:—*Held*, that this was not a case of principal and surety, but only of statutory liability; and that *H.* was, notwithstanding the compromise with *D.*, still liable as a contributory. *In re* Contract Corporation. Hudson's Case - - - - - 1
—— Misrepresentation in prospectus - 331
See Misrepresentation in Prospectus.

PAYMENT OUT OF COURT—Costs under Act of Parliament - - - 488, 537
See Costs under Act of Parliament. 1, 2.

PETITION—Administration suit—As to mode of taking accounts - - - 586
See Partnership Accounts.
—— Confirmation of Sales Act—Service - 86
See Confirmation of Sales Act.
—— Payment of dividends—Costs of trustees 111
See Costs of Trustees.

PLAINTIFF—Interest surviving to Defendant—Revivor - - - - 198
See Revivor and Supplement.

PLEADING—Bill by annuitant against specific legatees - - - - 225
See Conditional Gift. 1.
—— Multifariousness—Administration of estate and partnership accounts - - 547
See Multifariousness.
—— Multifariousness—Objection must be by demurrer - - - - 366
See Carriageway or Footway.
—— Suit to ascertain value with a view to election - - - - - 617
See Election, Doctrine of.
—— Unfounded allegations in bill - - 24
See Unfounded Allegations in Bill.

PORTIONS—*Prospective Exercise of Power—Death of Child—Further Exercise of Power—Number of Objects—Maintenance.*] Tenant for life of real estates, being empowered by the settlement to charge by deed or will for portions for younger children of his, by any woman he might marry, any sum not exceeding, if there should be but one such child or two such children, and no more, £3000; if three, and no more, £4000; and if four or more, £5000, "to vest in, be paid to, or divided amongst the child or children respectively for whom the same respectively shall and may be charged, or to or among him, her, them, and his, her, or their respective issue," at such ages or times, "with such maintenance meanwhile," as he should appoint—by his marriage settlement, dated in 1829, in exercise of the power, charged the estates with the payment for younger children of the marriage, if there should be but one such child, or two children, and no more, of £3000; if three, and no more, of £4000; and if four or more, of £5000, "to vest in and be paid to such children respectively, or in and to any one or more of them" exclusively, at such ages or times, in such shares and proportions, and with such yearly sums for maintenance "until their respective portions shall become payable," as he should by deed or will appoint; and in default of appointment, the sum so charged to be equally divided between and amongst such younger children, "to become a vested interest in such of them as," being sons, should attain twenty-one, or, being daughters, should attain twenty-one or marry, which should first happen. If any younger child should die under twenty-one, or, being a daughter, without being married, then the portion of such child, original and accruing, was to accrue and belong to the survivors or survivor, others or other of the younger children.—There were issue of the marriage three daughters and two sons. One daughter died under twenty-one, and unmarried; and a second died leaving issue. After the death of both, the husband (having survived the wife) appointed £5000, as to £2500 for the surviving daughter, as to £2000 for one of the sons, and as to £500 for the two infant children (of whom one had since died) of the deceased daughter:—*Held*, that, in the events that had happened, the whole sum of £5000 had become appointable under the power; and that the interest of the £500 was applicable for the benefit of the grandchild during her minority. Knapp *v.* Knapp - - 238

—— Vesting—Executory settlement - 280
See Executory Settlement. 1.

POSSESSION—Adverse, by agent - - 149
See Limitations, Statute of. 2.

—— Sheriff—Winding-up order - - 190
See Execution Creditor. 1.

POWER—Appointment without reference to power [482
See Appointment without reference to Power.

—— Charging portions - - - 238
See Portions.

—— Leasing—Case for advice of Court - 124
See Power of Leasing.

POWER OF LEASING—*Will—Questions for Opinion of Court—Trustees.*] The Court, on a special case under the 22 & 23 Vict. c. 35, and the 23 & 24 Vict. c. 38, for its opinion, declined to give power to trustees to grant leases of real estate for a term not exceeding ten years.—*Naylor* v. *Arnitt* (1 Russ. & My. 501) observed upon. *In re* Shaw's Trusts - - - - - - 124

POWERS OF DIRECTORS—*Company—Agreement of Directors to remunerate Agent—Informal Letter of Directors—Powers of Directors not acting at a Board Meeting—Liability of Company.*] By the articles of association of a telegraph company it was provided that three directors should be the quorum necessary for the transaction of business; and the directors were empowered, in their discretion, to sell all or any one or more of the company's lines of telegraph, grants, licenses, powers, ways, way-leases, easements, privileges, engagements, or contracts, or any part of its goodwill, estate, property, or interest therein, upon such terms and conditions as they should deem expedient; and also at their discretion to appoint agents; any such agent to be remunerated at the discretion of the directors.—The company resolved to sell their undertaking to the Postmaster-General; and in July, 1869, a letter was written addressed to *C.*, appointing him to act as agent for the directors in the matter of the sale, and agreeing that if he succeeded in obtaining from the Postmaster-General the sum of £20,000 or upwards, his commission should be £25 per cent. The letter concluded by saying: "We engage to sign a legal obligation to the above effect, when called upon, and to get the signature of our brother directors." This letter was written in *C.'s* office, and there signed by two of the directors and handed to *C.*, who forwarded it to a third director in the country, by whom it was returned to *C.* confirmed and signed by himself and a fourth director. This agreement, though not appearing to have been resolved upon or confirmed at any meeting of directors, was referred to at a subsequent meeting of shareholders, and not repudiated; but no such legal obligation as referred to in the letter was executed. The sale having been effected through *C.'s* agency for a sum of more than £20,000:—*Held*, that the agreement was not *ultrà vires;* and that though informal according to the internal regulations of the company, it was binding against the company in favour of a person dealing with them; consequently, that *C.* was entitled to commission at the rate of 25 per cent. *In re* Bonelli's Telegraph Company. Collie's Claim - - - 246

PRACTICE—Appeal in bankruptcy—Costs of successful appellant - - - 596
See Costs of Appeal.

—— Concurrent suits—Conduct of cause 479
See Concurrent Suits.

—— Confirmation of Sales Act—Service of petition - - - - - 86
See Confirmation of Sales Act.

—— Costs between solicitor and client - 438
See Costs between Solicitor and Client.

—— Dismissal for want of prosecution—Motion to restore bill - - - 103
See Dismissal for want of Prosecution.

PRACTICE—*continued.*
—— Petition as to mode of taking accounts 586
See Partnership Accounts.
—— Revivor—Death of sole Plaintiff - 198
See Revivor and Supplement.
—— Security for costs - - - 112
See Security for Costs.
—— Service of decree - - - 152
See Service of Decree.
—— Settled Estates Act - - 12, 199
See Settled Estates Act. 1, 2.
—— Unfounded allegations—Withdrawal of 24
See Unfounded Allegations of Bill.
PRE-EMPTION—Superfluous lands—Company 9
See Superfluous Lands.
PRINCIPAL AND SURETY—Transferee of shares
See Past Member. [1
PRIORITY—Legal estate without notice - 78
See Priority by legal Estate.
—— Mortgage—Foreclosure suit—Form of decree - - - - - 395
See Foreclosure Suit. 1.

PRIORITY BY LEGAL ESTATE—*Successive Incumbrancers—Legal Estate without Notice—Acquisition of legal reversionary Term.*] A legal estate to give priorities as between incumbrancers having equal equities is not of necessity such an estate as will enable the holder to bring ejectment. *A.*, having a legal term of ninety-nine years in a house, mortgaged it to *B.* by way of sub-lease, reserving a reversion of two days. He then made an equitable charge by a memorandum to *C.* He then assigned the term to *D.* to secure a further advance. *D.* had notice of *B.*'s incumbrance, but not of *C.*'s. *C.* registered in *Middlesex*, but *D.* did not search the register, and was therefore not affected by notice:—*Held*, by the Vice-Chancellor, that the equities between *C.* and *D.* being equal, the reversion of two days which *D.* acquired by his assignment was a legal estate which entitled him to priority.—On appeal, the Lords Justices, after hearing the question argued, expressed themselves not prepared to affirm this view, but the matter was compromised before they delivered judgment. *In re* Russell Road Purchase-moneys [78

PROFITS—Partnership—What are - - 586
See Partnership Accounts.

RAILWAY COMPANY—Money deposited under Lands Clauses Act - - - 418
See Costs under Lands Clauses Act.
REBUILDING MANSION—Jurisdiction of Court to sanction mortgage - - - 169
See Mortgage to rebuild Mansion.

RECEIVER—*Authority—Proof in Bankruptcy—Satisfaction of Debt.*] Where a receiver in the cause, without obtaining leave from the Court, proved against the estate of a bankrupt legatee, who was a debtor to the estate:—*Held*, that the receiver must be treated for this purpose as having authority, and that the effect of the proof was to discharge the debt and entitle the bankrupt, whose bankruptcy had been annulled, to his legacy. Armstrong *v.* Armstrong - - - 614

RECONSTRUCTION OF COMPANY—*Companies Act*, 1862—*Rights of Majority—Arbitration—Costs—Voluntary Winding up.*] In sanctioning a scheme for the reconstruction of a company under liquidation, by a transfer of its assets to a new company to be formed for the purpose, the Court will have regard to the wishes of a majority of the shareholders and creditors deliberately expressed upon full information fairly afforded to them as against the opposition of a dissentient minority; and although a dissentient shareholder cannot be compelled to accept shares in the new company, or the valuation put upon his interest by the official liquidator, if he will accept neither of these alternatives the price of his interest must be settled by arbitration, as provided by the *Companies Act*, 1862, s. 162.—Where no direct sum has been tendered by the official liquidator as the price of such dissentient shareholder's interest, the costs of the arbitration will not be at the risk of the shareholder, but will remain in the discretion of the Court.—Sect. 161 of the *Companies Act*, 1862, does not relate to a purely voluntary winding-up only, but includes a voluntary winding-up under supervision of the Court. *In re* Imperial Mercantile Credit Association - - 504

2. —— *Rights of Majority of Shareholders.*] Observations on the duty of the Court in sanctioning a scheme for the reconstruction of a company, to have regard to the wishes of a majority of the shareholders and creditors. *In re* Agra and Masterman's Bank - - - 509, n.

REGISTRATION—Bill of sale—Agreement to give - - - - - 598
See Order and Disposition. 2.
—— Title—Land Registry Act - - 398
See Land Registry Act.
RELIGIOUS PURPOSES - - - 574
See Mortmain. 4.
RENT—Arrears after death of tenant - 89
See Specialty Debt. 1.
RENT-CHARGE—Married woman—Mortgage [553
See Mortgage by Husband and Wife.
RESERVATION OF MINERALS - - 86
See Confirmation of Sales Act.
RESIDENCE—Condition of - - - 604
See Conditional Gift. 3.
RESIDUARY GIFT—Devise of "whole of my property" - - - - 482
See Appointment without reference to Power.

RETAINER BY EXECUTOR—*Will—Insolvency of Testator—Legal and Equitable Assets—Rateable Distribution.*] A trustee of an estate devised or conveyed to him for the purpose of paying debts has no right of retainer thereout, whether he is executor or not.—An executor, who was also trustee for sale of an estate for the payment of debts, was a creditor of his testator, who died insolvent, and had received personal estate which he had retained in part satisfaction of his debt. The real estate was sold, a portion before the time when a creditor's suit was instituted, and the remainder under the decree, and the proceeds as to part were in the executor's hands, and the remainder in Court:—*Held*, that the other creditors must be paid out of the proceeds of sale up to an equality

RETAINER BY EXECUTOR—*continued.*
with the executor, and that there must then be a rateable distribution.—*Lovegrove* v. *Cooper* (2 Sm. & Giff. 271) and *Hall* v. *Macdonald* (14 Sim. 1) observed upon. BAIN *v.* SADLER - - 570

REVERSIONARY TERM—Legal estate without notice—Priority - - - 78
See PRIORITY BY LEGAL ESTATE.

REVIVOR AND SUPPLEMENT—*Practice—Death of sole Plaintiff—Interest surviving to a Defendant.*] An administration suit was instituted by a trustee of a will against the residuary devisees and legatees, one of whom was a co-trustee with the Plaintiff. The Plaintiff died after decree, and the suit was revived by an original bill against the same parties by a trustee appointed in the place of the original Plaintiff. The new Plaintiff having died:—*Held*, that the suit might be revived by the common order at the instance of one of the Defendants, who was a residuary devisee and legatee, but was not and did not intend to become a trustee. EDMONDSON *v.* SHARP. DEAN *v.* SHARP - - - - - 198

RIGHT OF WAY—Carriage or footway - 366
See CARRIAGEWAY OR FOOTWAY.

SALE—Colliery—Parties to conveyance - 472
See SALE BY LIQUIDATOR.

—— Undervalue—Misrepresentation - 320
See SALE AT UNDERVALUE.

SALE AT UNDERVALUE—*Vendor and Purchaser—Misrepresentation—Agency.*] Where the Plaintiff, a single woman, was informed by her brother's agent that on his death she had succeeded to a small estate, of which she knew nothing, and on the agent's representations of its value, which were inaccurate, and without legal advice, she conveyed the estate for an inadequate sum to the agent's daughter, the Court set the deed aside with costs:—*Held*, also, that there was no such relation between the parties as to incapacitate the agent from purchasing:—*Held*, further, that the agent's claim for advances to Plaintiff's brother, as to which he pledged his oath, but of which there was no corroborative evidence of any kind, must be disallowed. HAYGARTH *v.* WARING [320

SALE BY LIQUIDATOR—*Vendor and Purchaser—Company—Grant of Powers of Distress and Entry to Lenders to secure Payment of a Royalty—Lenders not necessary Parties to Conveyance.*] A limited colliery company resolved to enlarge its capital, and that 6*d.* per ton of coal should be retained to repay the persons advancing the additional capital, with powers of distress and entry; and in conformity therewith, by a deed to which the company and the lenders were parties, in consideration of the advance, the company covenanted to repay the sums advanced, and to retain 6*d.* per ton to pay for such advances, with power for a majority of the lenders irrevocably to appoint a receiver; also that if default should be made by the company in retaining and paying the said rate, or if a majority of the lenders should be of opinion that the company could not in any half-year pay such rate, it should be lawful for such majority to enter and distrain upon the collieries and business of the company.—The company being in liquidation under supervision, the liquidators contracted to sell one of the collieries:—*Held*, that the lenders were not necessary parties to the conveyance by the liquidators to the purchaser. *In re* SANKEY BROOK COAL COMPANY. *In re* RADLEY AND BRAMALL - - - - - 472

SATISFACTION OF DEBT—Proof in bankruptcy
See RECEIVER. [614

SCOTCH CURATOR BONIS—*Allowed to retain Assets under an English Administration.*] A *curator bonis* and *factor loco tutoris* of Scotch infants:—*Held*, not bound to pay into Court assets belonging to the infants receivable under an English will of which the curator was administrator, and which was in course of administration by the Court. MACKIE *v.* DARLING - - - 319

SECURITY FOR COSTS—*Practice—Petition for Winding-up—Amount of Security—Filing Affidavits—Waiver.*] A Petitioner—an unsatisfied judgment creditor—residing out of the jurisdiction, asking for an order for the compulsory winding-up of an association, was, on the application of the Respondents, ordered to give security for costs to the amount of £100:—*Held*, that filing affidavits after taking out a summons for security was not a waiver *In re* HOME ASSURANCE ASSOCIATION (No. 2) - - - - 112

SEIZURE—Execution creditor - - 190, 207
See EXECUTION CREDITOR. 1, 2.

SEPARATE USE—Charge for solicitor's costs
See SOLICITOR'S LIEN. - - [115

SEQUESTRATION—*Church Discipline Act* (3 & 4 *Vict. c.* 86)—*Suspension of Clerk for Misconduct—Sequestration—Right to the Proceeds of Sequestration.*] Where a living is vacant by reason of the suspension of a clerk under sentence founded on proceedings under the *Church Discipline Act*, and the proceeds have been sequestrated, the fruits of the sequestration belong to the bishop, as chief pastor of the church, subject to the duty of providing for the services. *In re* THAKEHAM SEQUESTRATION MONEYS - - - 494

—— In Chancery—Injunction in Bankruptcy against sale - - - - 137
See INJUNCTION IN BANKRUPTCY.

SERVICE—Decree, effect of - - - 152
See SERVICE OF DECREE.

—— Petition under Confirmation of Sales Act
See CONFIRMATION OF SALES ACT - 86

SERVICE OF DECREE—*Practice—Administration Suit—Party served with Decree—Liability to Account—15 & 16 Vict. c. 86, s. 42, r. 8.*] The effect of service of a decree under 15 & 16 Vict. c. 86, s. 42, r. 8, is to bind the interest of the party served in the subject-matter of the suit, and not to impose on him any liability to account. WALKER *v.* SELIGMANN - - - - - 152

SET-OFF—Partnership debts—Separate debt of one partner - - - - 69
See JOINT AND SEPARATE DEBTS.

SETTING ASIDE DEED—Sale at undervalue 320
See SALE AT UNDERVALUE.

SETTLED ESTATES ACT—*Sale—Interim Investment of Purchase-money—*(19 & 20 *Vict. c.* 120, *s.* 25—23 & 24 *Vict. c.* 38, *ss.* 10, 11.] Money received by trustees upon a sale under the *Leases and Sales of Settled Estates Act* may be invested

SETTLED ESTATES ACT—*continued.*
in any of the investments in which cash under the control of the Court may be invested. *In re* Cook's Settled Estates. - - - 12

2. —— *Practice*—(19 & 20 *Vict. c.* 120), *s.* 37—*Married Woman Petitioner—Separate Examination of Petitioner dispensed with.*] Where, in a petition under the *Leases and Sales of Settled Estates Act*, a married woman is a petitioner, the Court may, upon reasonable ground, dispense with the examination required by sect. 37 of the Act; and will do so where it is satisfied that the order asked for is beneficial to all parties, and that the delay necessary for taking the examination would be prejudicial. *In re* Halliday's Settled Estates - - - - - - 199

SETTLEMENT—Executory - 218, 280, 491
See Executory Settlement. 1, 2, 3.

—— Marriage—Settlement by Court of Chancery [32, 38
See Settlement by the Court. 1, 2.

—— Voluntary—Trust for maintenance - 422
See Maintenance. 1.

—— Voluntary—13 Eliz. c. 5 - - 158
See Fraudulent Conveyance.

SETTLEMENT BY THE COURT—*Marriage Act* (4 *Geo.* 4, *c.* 76), *s.* 23—*Minor—License—Misrepresentation by Husband—Forfeiture—Fund in possession not ordered to be settled, but directed to be transferred into Court—Declaration of Trusts of Funds in Possession and Reversion.*] A husband procured his marriage with a minor to be solemnized by a license, contrary to the provisions of the *Marriage Act* of 1823, by falsely swearing to certain matters to which he was required by the Act personally to swear, he wilfully and knowingly so swearing, and thereby incurred a forfeiture of all such estate, right, title, and interest as should then have accrued, or should thereafter accrue to him by force of the marriage. Immediately before the marriage, the wife was entitled absolutely to a sum of stock outstanding in trustees, and she was also entitled to certain reversionary interests in stock expectant on the death of her mother.—The fund in possession being small, the Court, instead of ordering a settlement, after declaring the forfeiture, directed the trustees to transfer the residue of the fund into Court, and declared the trusts.—Form of order, declaring trusts of the funds both in possession and reversion. Attorney-General *v.* Clements - - - - - 32

2. —— *Marriage Act* (4 *Geo.* 4, *c.* 76), *s.* 23—*Minor—License—Misrepresentation by Husband—Forfeiture—Form of Settlement.*] In cases of forfeiture under the *Marriage Act*, 1823, where the property of a female minor is settled by the Court, the proper form of limitation comprises a general power to the wife of appointment by will, in default of children, without words to exclude the husband.—*Attorney-General* v. *Lucas* (2 Ph. 753) followed.—Orders under the *Marriage Act* as to settlements ought not to be made without the Attorney-General appearing separately from the relator. Attorney-General *v.* Read. - 38

SHARES—Building society—Do not pass under a bequest of money - - - 455
See "Money."

SHARES—*continued.*
—— Deposit of things in action—Bankruptcy 354
See Order and Disposition. 1.

SHIFTING CLAUSE—Accession to peerage 280
See Executory Settlement. 2.

SHIP—General—Notice of charterparty—Lien for freight - - - - 378
See General Ship.

SHIPBUILDING—Contract for—Power to enter and complete works - - 18
See Specific Performance—Negative Stipulation.

SISTERS OF CHARITY—Bequest to - 574
See Mortmain. 4.

SOLICITOR—Charge for Costs - - 115
See Solicitor's Lien.

—— Costs between solicitor and client - 438
See Costs between Solicitor and Client.

—— Fraud of—Liability of trustee - 373
See Investment by Trustee.

SOLICITOR'S LIEN—23 & 24 *Vict. c.* 127—*Costs charged on Fund preserved—Married Woman—Separate Estate without Power of Anticipation.*] Costs of a married woman, incurred by her in the defence to a suit by her husband to set aside a post-nuptial settlement whereby funds were assigned to trustees to secure an annuity to her separate use, without power of anticipation, charged under the provisions of sect. 28 of 23 & 24 Vict. c. 127, on the annuity. *In re* Keane. Lumley *v.* Desborough - - - 115

SPECIALTY DEBT—*Arrears of Interest accrued due since Testator's Death—Bond—Liability under an Agreement by Deed to enter into a Covenant to pay Rent and make Repairs.*] By an agreement under seal, *E.* covenanted with *B.*, his executors and administrators, that he would at any time thereafter, at the request of *B.*, his executors, administrators, or assigns, execute a demise of certain freeholds for the term of twenty-one years, at the yearly rent of £180, which lease should contain a covenant to keep the premises in good and substantial repair, and all other usual covenants; and *B.* thereby, for himself, his executors, or administrators, covenanted with *E.*, whenever thereto requested by *E.*, to accept such lease, and execute a counterpart thereof.—Under this agreement *B.* entered and paid rent until his death (which took place before the 1st of January, 1870), and after his death his widow and legal personal representative entered and paid rent. No lease was ever executed, and no such request, as above-mentioned, was ever made by either party. Since *B.'s* death rent had accrued due, and a sum was required for repairs:—*Held*, that the liability under the deed was from the first, and still was, a specialty; hence, that a claim by *E.* for the sums due for arrears of rent and dilapidations under the covenants agreed to be entered into by *B.* were debts by specialty against his estate.—Whether an arrear of rent accruing due after the death of a lessee by lease or parol (dying before the 1st of January, 1870), ranks as a specialty debt against his estate, *quære.* Kidd *v.* Boone - - - - - 89

2. —— *Assignment of Fund—Covenant for*

SPECIALTY DEBT—*continued.*

further Assurance.] *A.* assigned to the trustees of his marriage settlement an equitable interest in certain copyholds, with a covenant for further assurance. *A.* afterwards got himself admitted and sold the copyholds, and received the purchase-moneys and applied them to his own use:—*Held*, that the trustees were entitled under the covenant to prove against his estate as for a specialty debt. *In re* Dickson. Blackburn *v.* Dickson - 154

SPECIFIC LEGACY—Whole of personal estate 175
See Exoneration of Personalty.

SPECIFIC PERFORMANCE—Allotment of shares—Laches - - - - 268
See Abandonment of Shares.

—— Lease of superfluous lands of company 9
See Superfluous Lands.

—— Negative stipulation—Power to enter in default - - - - 18
See Specific Performance—Negative Stipulation.

SPECIFIC PERFORMANCE—NEGATIVE STIPULATION—*Shipbuilding — Contract — Injunction.*] A firm of shipbuilders agreed to alter a vessel according to a specification; and it was provided that in case of their failing to execute the alterations according to the agreement the owners of the vessel should be at liberty, with workmen, to enter on the shipbuilders' yard, and themselves complete the alterations. The shipbuilders were adjudicated bankrupts before the vessel was completed:—*Held*, that the Court could not specifically perform the whole agreement, and therefore would not restrain the trustee under the bankruptcy from selling the dock in which the vessel was lying, although the owners might be thus prevented from themselves entering and completing the vessel pursuant to the agreement. Merchants' Trading Company *v.* Banner - - 18

SPECULATIVE TRANSACTION — Solvency — Voluntary settlement - - 158
See Fraudulent Conveyance.

STATUTES:

13 Eliz. c. 5—*Fraudulent Conveyances* - 158
See Fraudulent Conveyance.

9 Geo. 2, c. 36—*Mortmain* 201, 444, 544, 574
See Mortmain. 1, 2, 3, 4.

39 & 40 Geo. 3, c. 98—*Accumulations* - 559
See Accumulations.

50 Geo. 3, c. 88—*Highgate Archway* - 9
See Superfluous Lands.

4 Geo. 4, c. 76, s. 23—*Marriage* - 32, 38
See Settlement by the Court. 1, 2.

3 & 4 Will. 4, c. 27, s. 9—*Limitations* - 149
See Limitations, Statute of. 2.

3 & 4 Will. 4, c. 42—*Limitations* - 41
See Limitations, Statute of. 1.

3 & 4 Vict. c. 86—*Church Discipline* - 494
See Sequestration.

8 Vict. c. 18, ss. 80, 85—*Lands Clauses Act* [418
See Costs under Lands Clauses Act.

—— —— s. 120 - - - - 389
See Compensation under Lands Clauses Act.

13 & 14 Vict. c. 60, ss. 2, 32—*Trustee Act* 214
See Trustee Act. 2.

STATUTES—*continued.*

13 & 14 Vict. c. 60, s. 10 - - 932
See Trustee Act. 3.

—— —— s. 32 - - - - 61
See Trustee Act. 1.

15 & 16 Vict. c. 55, ss. 6, 9—*Trustee Extension Act* - - - - 214
See Trustee Act. 2.

15 & 16 Vict. c. 86, s. 42—*Chancery Improvement* [152
See Service of Decree.

—— —— —— - - - - 547
See Multifariousness.

17 & 18 Vict. c. 36—*Bills of Sale* - 593
See Order and Disposition. 2.

19 & 20 Vict. c. 120, s. 25—*Settled Estates Act* [12
See Settled Estates Act. 1.

—— —— s. 37 - - - - 199
See Settled Estates Act. 2.

22 & 23 Vict. c. 35—*Law of Property* - 124
See Power of Leasing.

23 & 24 Vict. c. 38—*Law of Property* - 124
See Power of Leasing.

—— —— s. 10 - - - - 12
See Settled Estates Act. 1.

23 & 24 Vict. c. 127—*Solicitors* - - 115
See Solicitor's Lien.

25 & 26 Vict. c. 53, s. 71—*Land Registry* 398
See Land Registry Act.

25 & 26 Vict. c. 89, s. 91—*Companies Act* 26
See Winding-up Petition. 1.

—— —— s. 161 - - - 504, 509, n.
See Reconstruction of Company. 1, 2.

—— —— s. 163 - - - - 190
See Execution Creditor. 1.

25 & 26 Vict. c. 108—*Confirmation of Sales* 86
See Confirmation of Sales Act.

32 & 33 Vict. c. 71, s. 13—*Bankruptcy* - 137
See Injunction in Bankruptcy.

—— —— s. 15 - - - - 354
See Order and Disposition.

—— —— ss. 65, 72 - - - 207
See Execution Creditor. 2.

—— —— s. 92 - - - - 358
See Fraudulent Preference.

—— —— s. 117 - - - - 61
See Trustee Act. 1.

32 & 33 Vict. c. 114—*Railways Abandonment* 454
See Costs under Railways Abandonment Act.

SUB-CONTRACT—*Vendor and Purchaser—Assignment of Contract — Subsequent Conveyance by Vendor to a Stranger.*] A vendor agreed to sell a piece of land to *M.* with immediate possession, the purchase to be completed in five years. Before completion *M.* agreed to sell the land to *C.*, and the agreement was registered in the district registry, with a receipt for part of the consideration money which *C.* had laid out for *M.* in buildings on the land. *C.* offered to pay the vendor the amount agreed upon between him and *M.*, and applied for the delivery of the abstract, but the vendor refused to convey to him the land in question unless he would purchase other land also agreed to be sold to *M.*, and shortly afterwards the vendor and *M.* conveyed the land to *H.*

SUB-CONTRACT—*continued.*
On a bill filed by *C.* against the vendor, *M.*, and *H.*, alleging that *H.* had constructive notice of his title, and praying a conveyance of the estate:—*Held*, that, whether *H.* had such notice or not, the conveyance to him could not be set aside. Crabtree *v.* Poole - - - - - 13

SUPERFLUOUS LANDS—*Specific Performance—Right of Pre-emption in the "Person" of whom Land was purchased—Highgate Archway Company's Act* (50 *Geo.* 3, *c.* 88), *ss.* 52, 53.] By the *Highgate Archway Company's Act* (50 Geo. 3, c. 88), ss. 52, 53, the company were empowered to re-sell or dispose of part of the lands which they were by the Act authorized to purchase, provided that they should first offer the same to the person or persons of whom the same had been purchased:—*Held*, that the right of pre-emption was limited to the actual vendors to the company, and could not be claimed by their successors in title.—Specific performance of an agreement entered into with the company for a lease of such land after the death of the vendor, without any offer of pre-emption to his heirs or assigns, decreed. Highgate Archway Company *v.* Jeakes - 9

SURVIVORSHIP—Death without issue - 302
See Death coupled with a Contingency.

TENANT FOR LIFE—Gift to *A.* and her children [432
See Gift to Wife and Children. 2.

TENANT IN COMMON—"Every son during his life" - - - - - - 400
See Gift in Succession or to a Class.

TRADE-MARK—*Injunction—Consignee of Goods bearing spurious Mark—Parties—Costs—Lien on Goods.*] A person having in his hands or under his control goods bearing a forged trade-mark, is bound, upon the fact being brought to his knowledge, at once to submit to do whatever he might be compelled to do upon bill filed; otherwise, however innocently the goods may have come to him, he will be liable for the costs of a suit instituted by the person whose right is infringed for the purpose of obtaining relief.—The duties of a person who discovers that he has in ignorance infringed a trade-mark considered.—A firm of forwarding agents, carrying on business in *London*, received from correspondents abroad a case of cigars bearing a forged brand. Upon the forgery being brought to their notice, they expressed their willingness to give, and afterwards gave, full information as to the manner in which the cigars came into their custody: and upon a suit being instituted against them, submitted to act as the Court should direct; but they wished to return the cigars to their correspondents, and to some extent defended the suit on their behalf:—*Held*, that they were not entitled to their costs; but as they were willing to undertake to give notice to the Plaintiffs' agents if any boxes bearing the Plaintiffs' brand were afterwards consigned to them, they were not ordered to pay costs.—The Plaintiffs, in a suit to restrain infringement of their trade-mark:—*Held*, entitled to have a spurious imitation of their mark removed from goods, and to a lien on the goods for costs, provided that the owners of the goods, who were not before the

TRADE-MARK—*continued.*
Court, should not see fit to intervene. Upmann *v.* Elkan - - - - - - 140

TRUST—Executory—"To be settled" - 491
See Executory Settlement. 3.

—— Investment in land—Rebuilding parsonage
See Investment in Land. [77

—— Maintenance—Voluntary settlement - 422
See Maintenance. 1.

—— Wife and children—Joint tenancy - 218
See Executory Settlement. 1.

TRUSTEE—Bankruptcy—Appointment of new trustee by Court of Chancery - 61
See Trustee Act. 1.

—— Costs—Petition for payment of dividends 111
See Costs of Trustee.

—— Investment by—Loss of fund - - 373
See Investment by Trustees.

—— New—Appointment of—Trustee Act - 214
See Trustee Act. 2.

—— Power of leasing—Case for advice of the Court - - - - - 124
See Power of Leasing.

—— Retainer by trustee who is also executor 570
See Retainer by Executor.

TRUSTEE ACT—*Bankrupt Trustee—Jurisdiction of the Court of Chancery—Construction of Bankruptcy Act*, 1869, *s.* 117.] "The Court" having power under the 117th section of the *Bankruptcy Act*, 1869, by reference to the *Trustee Act*, 1850, s. 32, to appoint a new trustee in substitution for a bankrupt, is the Court of Chancery. Coombes *v.* Brookes - - - - - - 61

2. —— *Constructive Trusteeship—Appointment of new Trustees—No Trustees originally appointed.*] The Court has jurisdiction, under the *Trustee Act*, 1850, and the *Trustee Extension Act*, 1852, to recognise a constructive trusteeship of stock within the meaning of that term as used in the Acts, and to appoint trustees of a will, so far as regards that stock, in place of the constructive trustees, notwithstanding that no trustees were originally appointed by the testatrix. *In re* Davis' Trusts [214

3. —— *Trustee Act*, 1850, *ss.* 2, 10—*Joint Mortgage—Payment off—One of Joint Mortgagees out of Jurisdiction—Vesting Order.*] A mortgage of real estate was made to two persons, one of whom afterwards went abroad. Upon a sale of the mortgaged property by the mortgagor, so much of the purchase-money as was payable to the mortgagees was invested in their joint names:—*Held*, that the Court had no jurisdiction, upon a petition presented under the *Trustee Act*, 1850, by the mortgagor and the mortgagee within the jurisdiction, to make an order vesting in the purchaser the estate of the absent mortgagee. *In re* Osborn's Mortgage Trusts - - - 392

ULTRÀ VIRES—Building society—Power to borrow - - - - - 516
See Building Society.

—— Directors of company—Informal letter 246
See Powers of Directors.

UNFOUNDED ALLEGATIONS IN BILL—*Practice—Answer—Re-amended Bill—Costs occasioned by Charges subsequently withdrawn.*] When charges

UNFOUNDED ALLEGATIONS IN BILL—*contd.*
of misconduct are introduced into a bill, and are denied by the answer and then withdrawn, the Court will, at the hearing, make an order for payment by the Plaintiff of all the costs occasioned by such unfounded charges without any special application for the purpose.—The practice in *Mounsey* v. *Barnham* (1 Hare, 15, 22) not followed. Finch *v.* Westrope - - - 24

VENDOR AND PURCHASER—Assignment of contract - - - - 13
See Sub-contract.

—— Order for sale—Legal estate in administrator [309
See Administration with Will annexed.

—— Sale at undervalue - - - 320
See Sale at Undervalue.

VESTING—Portions—Executory settlement 280
See Executory Settlement. 2.

VESTING ORDER—Trustee Act—One of two mortgagees - - - - 392
See Trustee Act. 3.

VOID CONDITION—Residence—Violation of duty
See Conditional Gift. 3. [604

VOLUNTARY MAINTENANCE—Right of father to be recouped - - - 422
See Maintenance. 1.

—— Right of mother to be recouped - 566
See Maintenance. 2.

VOLUNTARY SETTLEMENT—Proof of solvency
See Fraudulent Conveyance. [158

VOLUNTARY WINDING-UP—Costs of liquidator, how payable - - - 126
See Costs of Liquidation.

WAIVER—Security for costs—Filing affidavits
See Security for Costs. [112

WAY—Carriage or footway - - - 366
See Carriageway or Footway.

WIFE AND CHILDREN—Gift to - 316, 432
See Gift to Wife and Children. 1, 2.

—— Trust for—How to be executed - 218
See Executory Settlement.

WIFE'S LEASEHOLDS—Assignment by husband —Equity to a settlement - - 609
See Equity to a Settlement.

WILL—Accumulation—Thelluson Act - 559
See Accumulations.

—— Annuities—Direction to accumulate surplus
See Accumulations. [559

—— Appointment—Devise "of the whole of my property" - - - - 482
See Appointment without reference to Power.

—— Charity—Ambiguous description - 183
See Cy-près.

—— Charity—Endowment of future church 201
See Mortmain. 1.

—— Charity—Contingent gift - - 544
See Mortmain. 3.

—— Charity—Gift to convent of nuns - 574
See Mortmain. 4.

—— Children who shall attain twenty-one 427
See Gift to Children at Twenty-one.

WILL—*continued.*

—— Conditional gift—Alteration by circumstances
See Conditional Gift. 2. [290

—— Conditional gift—Trust or condition - 225
See Conditional Gift. 1.

—— Conditional gift — Void condition — Residence - - - - 604
See Conditional Gift. 3.

—— Death coupled with a contingency - 302
See Death coupled with a Contingency.

—— "Every son during his life" - - 400
See Gift in Succession or to a Class.

—— Executory settlement—Shifting clause on accession to peerage - - 280
See Executory Settlement. 1.

—— Executory trust - - - - 491
See Executory Settlement. 2.

—— Exoneration of personalty - - 175
See Exoneration of Personalty.

—— Gift to wife and children - 316, 432
See Gift to Wife and Children. 1, 2.

—— Gift to daughter's husband - - 105
See Future Husband.

—— "Moneys in the house and out of it" 455
See "Money."

—— Mortmain - - 201, 544, 574
See Mortmain. 1, 3, 4.

—— Portions—Power of charging - - 238
See Portions.

—— Repetition of legacies - - - 525
See Cumulative Gifts.

—— Retainer by executor - - - 570
See Retainer by Executor.

—— Specific bequest of whole of personal estate
See Exoneration of Personalty. [175

WINDING-UP—Building society - - 516
See Building Society.

—— Execution after commencement of winding-up - - - - - 198
See Execution Creditor. 1.

—— Misrepresentation in prospectus - 331
See Misrepresentation in Prospectus.

—— Past member - - - - - 1
See Past Member.

—— Petition - - - - 26, 59, 188
See Winding-up Petition. 1, 2, 3.

—— Petition—Security for costs—Waiver 112
See Security for Costs.

—— Proof—Bill of exchange—Contract of indemnity - - - - 501
See Letter of Credit.

—— Reconstruction of company - 504, 509, n.
See Reconstruction of Company.

—— Sale by liquidation - - - 472
See Sale by Liquidator.

—— Voluntary—Costs of liquidator—How payable - - - - - 126
See Costs of Liquidation.

WINDING-UP PETITION—*Company—Creditor's Petition—Discretion of Court—Wishes of Majority of Creditors—Companies Act*, 1862, *s.* 91.] A winding-up order cannot be claimed *ex debito*

WINDING-UP PETITION—*continued.*

justitiæ by an unpaid creditor of a company, and the Court will have regard to the wishes of the majority of the creditors; and may, under the *Companies Act*, 1862, s. 91, dismiss a creditor's petition, though the debt has not been paid, where the majority of creditors desire a voluntary winding-up, and the Court is satisfied that that will be the preferable course. *In re* Langley Mill Steel and Iron Works Company - 26

2. —— *Creditor's Petition — Right of Petitioner to Dismiss—Costs.*] A creditor of a company, who had presented a petition for a winding-up order, and duly advertised it:—*Held*, entitled to dismiss his petition with costs, notwithstanding the objection of another creditor appearing on it; but the costs of the objecting creditor were included in the order. *In re* Home Assurance Association - - - - 59

3. —— *Companies Act*, 1862, *s.* 79 — *Only seven Shareholders and no Debts.*] The Court has jurisdiction to make an order to wind up a company where there are only a few shareholders and no debts.—*Re Natal, &c., Company* (1 H. & M. 639) and *In re Sea and River Marine Insurance Company* (Law Rep. 2 Eq. 545) considered. *In re* Sanderson's Patents Association - 188

WINDING-UP PETITION—*continued.*

WORDS—"Every son during his life" - 400
See Gift in Succession or to a Class.

—— "Moneys in the house and out of it" 455
See "Money."

—— "The whole of my property" - - 482
See Appointment without reference to Power.

—— "To be settled" - - - 491
See Executory Settlement. 3.

—— "Things in action" - - - 354
See Order and Disposition. 1.

—— "Unmarried" - - - - 105
See Future Husband.

—— "Wrongfully claiming" - - 149
See Limitations, Statute of. 2.

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